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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

No.

DONALD PRUESSMAN

Petitioner,

v.

GORDON LEWIS, M.D.; DR. JOHN T. MacDONALD FOUNDATION d/b/a DOCTORS HOSPITAL; JOSEPH F. McALOON; STUART L. SMITH; L.C. SMALL; CITY OF CORAL GABLES; KEN BUSH; R. POOR; D. MOORE; RICHARD J. NAUE, JR.; GLENN FALK; COMMUNITY HEALTH OF SOUTH DADE, INC.; JOHN H. TRENHOLM; JEROME BELOFF, M.D.; ANGEL DIAZ M.D.; MICHAEL ROBINSON

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED

Whether, in light of this Court's holding that federal courts have a *"virtually unflagging obligation"* to excercise their jurisdiction, can a United States District Court surrender that jurisdiction and dismiss an action brought under 42 U.S.C. §1983 when:

Dismissal is based on the existence of a concurrent state proceeding concerning the same subject matter;

The parties, issues, and damages in the federal and state actions are not identical;

Total relief for constitutional damages and declaratory judgment are not cognizable in the state proceeding;

The right to litigate federal claims in federal court have been specifically reserved on the state court record.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINION BELOW 2

JURISDICTION 2

UNITED STATES CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 22

The decision of the Eleventh Circuit Court of Appeals (a) Directly And Apparently Conflicts With Decisions Of This Court; (b) Raises Important Federal Jurisdictional Issues; (c) Conflicts With It's Own Decisions; (d) Conflicts With Decisions Of Other Circuit Courts Of Appeals; And (e) Raises Issues Of Importance To The Public.

CONCLUSION 45

INDEX TO APPENDIX A-1

APPENDIX. . . . . A-2 - A-65

TABLE OF AUTHORITIES

CASES: Page

Allen v. Louisiana St. Bd. of Dentistry,
835 F.2d 100 (5th Cir. 1988) 30

Allen v. McCurry,
449 U.S. 90 (1980) 29

American Manufacturers Mutual Insurance Company v. Stone,
743 F.2d 1519 (11th Cir. 1983) 26, 33

Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545 (1983) 24

Board of Education of Valley View v. Bosworth.
713 F.2d 1316 (7th Cir. 1983) 38

City of Riverside v. Santos Rivera,
477 U.S. 561 (1986) 39, 40

Colorado River Water Conservation District v. United States,
424 U.S. 800 (1976) 23, 24, 26, 20, 33

Collins v. Seaboard Coastline Railroad,
681 F.2d 1333 (11th Cir. 1982) 36, 37

Crane v. Fauver,
762 F.2d 325 (3rd Cir. 1985) 38

Crawley v. Hamilton County Commisioners,
744 F.2d 28 (6th Cir. 1984) 26

TABLE OF AUTHORITIES

Continued

CASES: Page

Deakins v. Monaghan,
-- U.S. --, 108 S.Ct. 523 (1988) 24, 38

Duke v. James,
713 F.2d 1506 (11th Cir. 1983) 31

England v. Louisiana Board of Medical Examiners, 375 U.S. 411 (1964) 34

Ex parte Virginia,
100 U.S. 339 (1880) 32

Forehand v. First Alabama Bank of Dothan,
727 F.2d 1033 (11th Cir. 1984) 25, 28, 31, 33

Gilmere v. City of Atlanta, Ga.,
774 F.2d 1495 (11th Cir. 1983) 32

Monroe v. Pape,
365 U.S. 167 (1961) 22, 29

Mitchum v. Foster,
407 U.S. 225 (1972) 32

Moses H. Cone Memorial Hospital Mercury Construction Corp.,
460 U.S. 1 (1983) . . . . . 23, 24, 26, 27, ... 31, 33, 37

Noonan South, Inc. v. County of Volusia,
841 F.2d 380 (11th Cir. 1988) 27, 30

Owens v. City of Independence,
445 U.S. 622 (1980) 41

TABLE OF AUTHORITIES

Continued

CASES: Page

Patsy v. Board of Regents, 457 U.S. 496 (1982) 32

Signad, Inc. v. City of Sugar Land, 753 F.2d 1338 (5th Cir. 1985) 26, 30

Tovar v. Billmeyer, 609 F.2d 1291 (9th Cir. 1980) 26, 30, 33

University of Oklahoma Gay People's Union v. Board of Regents, 661 F.2d 858 (10th Cir. 1981) 38

Western Food Plan, Inc. v. J.D. MacFarlane, 588 F.2d 778 (10th Cir. 1978) 38

Wilcox v. Consolidated Gas Co., 212 U.S. 19 (1909) 22

Williams v. Red Bank Bd. of Ed., 662 F.2d 1008 (3rd Cir. 1981) 24

UNITED STATES CONSTITUTION:

Amendment I 3, 28, A-61

Amendment IV 3, 4, A-61

Amendment V 3, 4, A-61

Amendment VIII 3, 4, A-62

Amendment XIV 3, 4, A-62

TABLE OF AUTHORITIES

(Continued)

FEDERAL STATUTES AND RULES:

28 U.S.C. §1254(1) 3

28 U.S.C. §1343 . . . . . 3, 14, A-6, A-64

42 U.C.C. §1983 . . . . . 2, 3, A-63

Fed.R.Civ.P. 15(a) 12

Fed.R.Civ.P. 4(c)(2)(C)(ii) 13

FLORIDA STATUTES (1981): Page

F.S. 394.459(2)(b) 9

F.S. 394.459(10)(a) 8

F.S. §394.463(1)(a) 5

F.S. §394.463(1)(b)(1) 6

F.S. §394.463(1)(b)(2) 6

F.S. §394.4.63(1)(b)(3) 6

F.S. §394.463(1)(c) 10

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PETITION FOR A WRIT OF CERTIORARI
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This Pro Se Petitioner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the

Eleventh Circuit Court of Appeals, entered in the above entitled proceeding on December 19, 1988, rehearing denied, January 23, 1989.

OPINION BELOW

The opinion of the Eleventh Circuit Court of Appeals is reproduced in the Appendix hereto, pages A-2 - A-5.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. §1983, this suit was brought in the Southern District of Florida. On February 8, 1988, the District Court dismissed the action.

The dismissal was appealed. On December 19, 1988, the Eleventh Circuit affirmed the District Court's dismissal. A timely motion for rehearing was sought and denied on January 23, 1989. Judgment was issued as Mandate on February 2, 1988.

The jurisdiction of this Court to review

the judgment of the Eleventh Circuit Court of Appeals is invoked under 28 U.S.C. §1254(1).

UNITED STATES CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES INVOLVED

The First, Fourth, Fifth, Eighth and Fourteenth Amendments of the United States Constitution are reproduced in the Appendix, pages A-61 - A-63.

42 U.S.C. §1983 is reproduced in the Appendix at page A-63. 28 U.S.C. §1343 at page A-64.

STATEMENT OF THE CASE

The matter before this Court concerns the dismissal of an action brought under 42 U.S.C. §1983 for deprivation of liberty without due process, unreasonable seizure, and cruel unusual treatment, under color of the Florida Mental Health Act, Chapter 394, Florida Statutes (1981). This Act is commonly referred to as the "Baker" Act.

The following is a brief synopsis of the complaint alleging violations of rights, privileges, and immunities guaranteed by the Fourth, Fifth, Eighth, and Fourteenth Amendments of the United States Constitution.

On May 10, 1982, I was admitted to Doctors Hospital via their emergency room and assigned to the care of Doctor Vincent Corso. During the course of hospitalization, with my consent, Dr. Corso ordered a psychiatric consultation. I was seen by Doctor Gordon Lewis on May 20, 1982. During the consultation, Dr. Lewis belittled my religious beliefs and berated my volunteer work with alcoholics. Consequently, after approximately fifteen minutes, I declined Dr. Lewis' services and asked him to leave.

My unexplained symptoms persisted and I expressed my displeasure with the care and treatment received. On May 26, 1982, Dr.

Corso discharged me but I was physically unable to leave the hospital. I requested that another physician be provided but the hospital declined to do so. Instead, at approximately 9 a.m. on May 28, 1982, Dr. Lewis reappeared informing me I was to be taken into custody by the police and transported to the psychiatric unit at Jackson Memorial County Hospital.

The Coral Gables police arrived at 12:37 p.m. and were requested by the hospital to take me into custody and removed under the Baker Act. The police refused to do so because I did not meet the statutory criteria to be legally taken into custody and confined.[1] Officer David Tranquil

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1/ Florida Statute 394.463(1)(a)(1981). Criteria for emergency admission and evaluation. "A person may be admitted to a receiving facility on emergency conditions if there is reason to believe that he is mentally ill and because of his illness is: 1. Likely to injure himself or others if allowed to remain at liberty; or 2. In need of care or treatment and lacks sufficient capacity to make a responsible application

(continued...)

advised hospital administrators they could obtain a court order,[2] or get a physician to execute a certificate for emergency admission.[3] Officer tranquil also spoke

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1/ (...continued)
on his own behalf, and an ex parte order is obtained authorizing the admission."

Florida Statute 394.463(1)(b)(2)(1981). "A law enforcement officer may take a person who appears to meet the criteria for emergency admission into custody and deliver him to the nearest receiving facility for emergency examination and treatment."

2/ Florida Statute 394.463(1)(b)(1)(1981). "A judge may enter an ex parte order stating that a person appears to meet the criteria for emergency admission, giving the findings on which that conclusion is based and directing that a law enforcement officer take the person into custody and deliver him to the nearest receiving facility for emergency examination and treatment."

3/ Florida Statute 394.463(1)(b)(3)(1981). "A mental health professional may execute a certificate that he has examined a person within the preceding 48 hours and finds that the person appears to meet the criteria for emergency admission, stating the observations upon which that conclusion is based. The mental health professional's certificate shall authorize a law enforcement officer to take the person into custody and deliver him to the nearest available receiving facility for emergency examination and treatment. The law enforcement officer shall execute a written report detailing the circumstances under which the person was taken into
(continued...)

with Dr. Lewis who agreed that a court order would be the appropriate course of action.

Neither Dr. Lewis or the hospital pursued a judicial order as agreed. Instead, later in the day, on May 28, 1982, Dr. Lewis executed a physicians certificate under color of authority of the Baker Act without conducting the examination required by law, and reciting actions on the certificate as a basis of detention and committment which he never observed.

Pursuant to said certificate, Coral Gables police officers again arrived on the scene at 5:51 p.m. I was removed from my hospital bed, taken into custody against my will, and transported to a designated receiving facility, Community Health of South Dade, Inc. ("CHI").

3/ (...continued)
custody. The report and mental health professional's certificate shall be made a part of the patient's clinical record."

The police officers who took me into custody failed to properly complete the "Report of Law Enforcement Officer" portion of the Physicians Certificate detailing the circumstances under which I was taken into custody as required by Florida law. *See Note 3.* Upon arrival at the receiving facility, the police relinquished custody to CHI who immediately confined me in a seclusion room without providing a written notice of the right of habeas corpus as required by Florida law.[4]

Shortly thereafter, upon demand, I was released signing a form to that effect. Because of my unstable physical condition, I requested to be seen by a medical doctor and was transported to CHI's emergency room. Approximately 50 minutes later, an attendant

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4/ Florida Statute 394.459(10)(a)(1981). "Each patient admitted to a facility for involuntary placement shall receive a written notice of the right to petition for a writ of habeas corpus."

from the locked mental health unit came and transported me back to that facility. In effect, CHI recommitted me without following mandatory statutory procedure for involuntary commitment. CHI destroyed the release form I had signed claiming that allowing me to sign it was in error.

I was again confined in a locked seclusion room with no external communications device, and without justification, placed in a restraint. I remained so confined for approximately nine hours and fifteen minutes in derogation of Florida law.[5] I was not examined by a mental health professional until the next day resulting in unreasonable prolonged cruel and unlawful detention. Florida law

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5/ Florida Statute 394.459(2)(b)(1981). "It is further the policy of this state that the least restrictive available treatment be utilized based on the individual needs and best interests of the patient."

requires that an examination be conducted without unnecessary delay.[6]

When finally examined on the morning of May 29, 1982, I was immediately released as I did not fit the criteria for involuntary confinement. I was transported via ambulance to an area hospital where neurological difficulties were discovered. I was ultimately diagnosed as suffering from Multiple Sclerosis.

Because of illness and difficulties in obtaining affordable counsel, no complaint was filed until May 28, 1986, the very day the applicable statute of limitations had run. On that day, separate complaints were filed in both federal and state courts, my federal claims in federal court and state

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6/ Florida Statute 394.463(1)(c)(1981). "A patient who is admitted for an emergency examination and treatment by a receiving facility shall be examined by a mental health professional without unnecessary delay, and may be given such treatment as is indicated by good medical practice."

claims for false imprisonment, assault and battery, and conspiracy in state court.

On October 2, 1987, the district court, sua sponte, rendered an Order to show good cause why the action should not be dismissed for lack of prosecution. The Order is reproduced at page A-9, infra.

A timely response was submitted on October 19, 1987, explaining to the court that the action had not been prosecuted due to illness, difficulties in obtaining affordable counsel, and the questionable conduct of attorneys I had retained. A complete disclosure of a concurrent state proceeding was made to the court at this time. The court was also made aware that the right to litigate my federal claims arising out of the same incident in the United States District Court had been specifically reserved on the state court record. My response is reproduced at pages

A-11 - A-20, infra.

Consequently, on November 24, 1987, the district court quashed its Order to Show Cause, taking note that I was proceeding pro se in the face of severe physical and financial hardship. The court also noted I would be unable to refile the action if it were dismissed because the applicable statute of limitations had run. The court directed me to effect service on all parties within 45 days after which I should proceed expeditiously with prosecution of the case. This Order is reproduced at page A-21, infra.

As permitted by Rule 15(a), Federal Rules of Civil Procedure,[7] I amended my complaint prior to service incorporating more precise factual allegations and adding

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7/ F.R.C.P. 15(a) provides that a party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served.

pendent state claims.

Then, pursuant to Rule 4(c)(2)(C)(ii), service was effected on all defendants on January 5, 1988, a date within the confines of the district court's order of November 24, 1987.[8]

On January 28, 1988, the court rendered an order declining to exercise pendent jurisdiction over state law claims and extending time for service an additional 45 days.[9] This Order is reproduced at page A-23, infra.

During the interim period, between the date service was effected (January 5th.),

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8/ F.R.C.P. 4(c)(2)(C)(ii) provides that a summons and complaint may be served upon a defendant by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person with two copies of a notice and acknowledgment form and a return envelope, postage prepaid, addressed to the sender.

9/ Extending time for service was unnecessary since service had been effected on January 5, 1988. The court was obviously unaware of this when it issued its order.

and the court's order dismissing state law claims (January 28th.), only defendants City of Coral Gables, Bush, Poor, Moore, and Naue (hereinafter referred to as City and Officers), and Lewis, made appearances and filed motions to dismiss, stay, or abate dated January 25, 1988.

Defendants argued that, with the exception of declaratory judgment, the federal complaint virtually mirrored the state complaint in both form and substance. City and Officers represented to the court that I was in violation of the court's order of November 24, 1987 for failure to effect service. City and Officers also argued that service was improper for having failed to comply with statutory notice requirements.

On February 8, 1988, predicated on the existence of the concurrent state proceeding, the court's interpretation of the congressional intent of 28 U.S.C. §1343,

and my "egregious" failure to prosecute the action, the district court granted defendants motions to dismiss. The order of dismissal is reproduced at page A-6, infra.

A motion to vacate the order of dismissal was filed on February 19, 1988. It was again asserted to the court that I had reserved my right to litigate my federal claims in federal court. I also indicated to the court that there were different parties and divergent issues in the state and federal forums. Further, proof of service was attached to the motion.[10] This Motion is reproduced at pages A-25 - A-41.

On March 2 and 4, 1988, defendants Lewis and City and Officers filed replies to my Motion to Vacate Order of Dismissal, arguing that I failed to allege sufficient reasons

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10/ See Appendix, pages A-27, A-38, A-39. It was also pointed out to the court that requirements of Rule 4(c)(2)(C)(ii) had been exceeded in that service was effected by certified mail.

why the court should grant relief from the operation of it's order of dismissal. Again, these defendants asserted to the court that the state court has concurrent jurisdiction to hear all claims, and that the state complaint virtually mirrors the federal complaint.

An order dated March 23, 1988 denying the Motion to Vacate Order of Dismissal is reproduced at page A-42, infra.

A Notice of Appeal was filed on March 31, 1988 and challenged on May 26, 1988 when defendant Lewis moved to dismiss the appeal moved to dismiss the appeal arguing that the Notice of Appeal was untimely filed. Lewis' motion was denied on August 8, 1988 as the Notice was timely. The corresponding Order is reproduced at page A-43, infra.

The issues delineated in my June 13, 1988 brief to the Eleventh Circuit were threefold. Whether the district court

applied the proper law in determining that a civil rights litigant may not maintain concurrent actions arising out of the same fact situation in both a federal and state forum; whether the district court abused its discretion in dismissing my federal action because of the existence of a concurrent state action arising from a common nucleus of operative facts; and whether I proceeded diligently, expeditiously, and in good faith in following the orders of the district court.

My brief asserted that the state action could not resolve all of the issues in the federal complaint. It also referred the court to the appropriate pleading which indicated I had specifically reserved my right on the state court record to litigate my federal claim in the United States District Court.

Defendants City and Officers submitted

their answer brief on July 8, 1988. They represented to the court that proper service had not been effected. They argued that the federal action was properly dismissed in deference to the state court since the same issues were involved and substantially identical relief was sought, and that by dismissing the action, the federal court promoted the conservation of judicial resources thereby preserving federal-state comity. They also argued that a declaratory judgment by the federal court would not serve a useful purpose in clarifying the legal relations at issue and would unnecessarily intrude upon the state court's jurisdiction. Finally, they argued that statutory notice requirements had not been complied with, that the City is not a person under 42 U.S.C. §1983, and the action was time-barred by a three year statute of limitation.

Defendant Lewis submitted his answer brief on July 13, 1988 arguing there is a general policy against dual litigation in both state and federal courts, that the causes of action are basically identical except for the declaratory judgment, and the court was correct in dismissing the action in deference to the pending state action because all issues surrounding my section 1983 claim could be resolved in state court. Also, that the action was time barred by a three year statute of limitation.

My reply brief was submitted on August 12, 1988. In response to City and Officers' allegations of insufficient or improper service, I again indicated to the court that service had been effected on all defendants within the time period mandated by the district court's order of November 24, 1987. I also asserted to the court that notice requirements do not apply to §1983

actions and municipalities are not entitled to immunity.

In response to defendants argument that the action was time-barred because of a three year statute of limitations, the court was apprised of the fact there has been no three year statute of limitations in Florida, for any cause of action, since 1974.

The circuit court was again advised that the parties issues, and damages are distinctly different in the state and federal actions.

On December 19, 1988, the circuit rendered its per curiam affirmance sanctioning the district court's dismissal of the action. This judgment is reproduced at pages A-2 - A-5, infra.

Since there was erroneous discussion in the court's opinion, and because it was void of any indication that certain crucial facts

were considered, a petition for rehearing was submitted on January 8, 1988. This petition is reproduced at pages A-44 - A-57, infra.

The following misapprehensions or oversight of the premises were indicated in the petition. That it was my pleading of October 19, 1987, not the defendants', which disclosed the state action to the district court, and that service was not effected on some of the parties, but on all of the parties on January 5, 1988. Also, that dismissal of the suit has precluded me from realizing both monetary damages and declaratory rights since there are parties in the federal action that are not parties in the state action.

On January 23, 1989, the circuit court denied my petition for rehearing. The corresponding order is reproduced at page A-58, infra.

Judgment was issued as a mandate on February 2, 1989. This is reproduced in the Appendix hereto at page A-59.

REASONS FOR GRANTING THE WRIT

The Decision Of The Eleventh Circuit Court Of Appeals: (a) Directly And Apparently Conflicts With Decisions Of This Court; (b) Involves Important Federal Jurisdictional Issues; (c) Conflicts With It's Own Decisions; (d) Conflicts With Decisions Of Other Circuit Courts Of Appeals; (e) Raises Issues Of Importance To The Public; and (f) Defeats Relief Under The Civil Rights Act Specified By Congress.

This case presents the question of whether and under what circumstances a federal district court can dismiss a §1983 action in deference to a parallel concurrent state proceeding.

It presents evidence that the spirit of §1983 legislation discussed in *Monroe v. Pape*, 365 U.S. 167 (1961), is being cast out by the less stringent justification for

surrender of federal jurisdiction indicated in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976); and *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1 (1983), which are not §1983 cases.

This petition will enlighten this Court of the obstacles encountered by a "judicially" indigent civil rights litigant, and presents an opportunity for the Court to address the dangers of uncontested encroachments on civil rights because of judicial financial barriers.

There is no indication that this Court has retreated from the general proposition that where federal-state concurrent jurisdiction exists, there is a "virtually unflagging" obligation of federal courts to exercise the jurisdiction given them, and only the clearest of justifications will

warrant dismissal.[11]

In *Colorado River* and *Moses H. Cone*, *supra*, this Court enumerated factors to guide federal courts in assessing the appropriateness of dismissal when there is an exercise of concurrent federal-state jurisdiction. The jurisdiction over property; inconvenience of the federal forum; desirability of avoiding piecemeal litigation; the order in which jurisdiction was obtained by the concurrent forums; whether federal or state law controls the action; and the adequacy of the state forum to protect the parties' rights.

There is no property involved in this case. A distance of three city blocks

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11/ *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817-819 (1976); *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 15-16 (1983); *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 571-572 (1983); *Deakins v. Monaghan*, -- U.S.--, 108 S.Ct. 523, 530 (1988).

between state and federal courts can hardly be considered an inconvenience. There is no federal policy of avoidance of piecemeal adjudication.[12] The federal forum first had jurisdiction in terms of when complaints were filed and there has been virtually no progress in the state action.[13] The adequacy of each forum to protect a parties rights would at the very least be a neutral factor. However, in this case, complete relief is not cognizable in the state court since the parties, issues, and damages are not the

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12/ "There is no. . .congressional policy. . .that sec. 1983 plaintiffs should be required to litigate their federal claims in state forums when actions involving the same transactions are pending in the state court. If there is any presumption on this point, it would tend to run in the opposite direction." *Forehand v. First Alabama Bank of Dothan*, 727 F.2d 1033, 1036 (11th Cir. 1984).

13/ The state action was abated on September 19, 1988. The status quo is identical to what was indicated to the circuit court in my petition for rehearing. See Appendix, pages A-52 - A-54.

same.[14]

It would appear that the factors of piecemeal litigation and progress of a concurrent state proceeding should not apply to §1983 suits.[15] Duplication seems to be the ususal, not an exceptional circumstance in §1983 litigation:

> On the issue of piecemeal litigation, we adopt the Ninth Circuits view that 'piecemeal litigation and some duplication of judicial effort is the unavoidable price of preserving access to the federal relief which section 1983 assures. *Signad, Inc. v. City of Sugar Land*, 753 F.2d, 1338, 1340 (5th Cir. 1985) citing *Tovar v. Billmeyer*, 609 F.2d 1291,1293 (9th Cir. 1980).

14/ See *Crawley v. Hamilton County Commissioners*, 744 F/2d 28. 31 (6th Cir. 1984), which suggests the action before this Court is not parallel to the state proceeding since federal and state actions are not identical. Therefore, application of the *Colorado River* doctrine is not applicable and the analysis called for in *Moses H. Cone Hospital* is unnecessary. Also see *American Manufacturers Mutual Insurance Co. v. Stone*, 743 F.2d 1519, 1525-26 (11th Cir. 1984).

15/ In this case, when the district court declined to exercise pendent jurisdiction over state claims, it actualy endorsed parallel litigation.

In affirming dismissal, the Eleventh Circuit, relying on *Colorado River, supra; Moses H. Cone Hospital, supra,* and *Noonan South, Inc. v. County of Volusia,* 841 F.2d 380 (11th Cir. 1988), concedes that the district court erred in its indication that a proceeding in state court is a bar to a proceeding in federal court concerning the same subject matter.

The court states it evaluated the factors listed in *Colorado River and Moses H. Cone Hospital,* but failed to elaborate on their evaluation. Instead, the court merely states that particular weight was given to the progress of the litigation in the state court and the exceptional circumstances concerning my "egregious failure to prosecute" the action.

Had the circuit court extended the consideration of informing me as to what exactly the "clearest of justification" was

for affirming the dismissal,[16] it would have made the task of writing this petition much easier.

The courts below seem to be fascinated with the factor of egregiousness for which I find no precedent.

The First Amendment right to petition the courts for redress of grievances requires compliance with certain rules, which in this case, are the Federal Rules of Civil Procedure, formulated by this very Court to aid the courts in their determination of justice. It logically follows that where there has been absolute compliance with the rules, any reference of egregiousness must be precluded.[17]

16/ [t]he law in this circuit requires clear and exceptional justification for dismissing a Sec. 1983 claim on grounds of *Colorado River* abstention. *Forehand v. First Alabama Bank of Dothan*, 727 F.2d 1033, 1036 (11th Cir. 1984).

17/ A review of procedural events described at pages 11 -16, supra, clearly shows that I diligently (continued...)

Without more, the circumstances set forth up to this point, are by themselves sufficient reason for granting the writ. However, there is more. The fact that the action dismissed was brought under 42 U.S.C. §1983, is a formidable reason why the circuit court should not have sanctioned the district court's dismissal.

Beginning with *Monroe v. Pape, supra*, this Court has made it abundantly clear that Congress passed §1983 to afford a federal right in a federal forum whether or not an action in federal court duplicates a parallel state remedy. In enacting this civil rights statute, Congress added to the jurisdiction of the federal courts, not subtracting from that of state courts. *Allen v. McCurry*, 449 U.S. 90, 99 (1980).

17/ (...continued)
complied with both the rules and orders of the district court.

The unflagging obligation to exercise jurisdiction over §1983 actions is "particularly weighty". *Allen v. Louisiana St. Bd. of Dentistry*, 835 F.2d 100, 104 (5th Cir. 1988); *Signad, Inc. v. City of Sugar Land*, 753 F.2d 1338, 1340 (5th Cir.1985), cert. denied, 474 U.S. 822 (1985); *Tovar v. Billmeyer*, 609 F.2d 1291, 1293 (9th Cir. 1979).[18]

There is no indication in this case that the Eleventh Circuit weighed the fact they were affirming dismissal of a §1983 action where the parties, issues, and damages are not identical to a concurrent state proceeding. In fact, evidence is to the contrary in that the court relied on *Noonan South, Inc., supra*, not a §1983 case.

In this case, it seems that the circuit court failed to heed this Court's admonition

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18/ Reserving question of whether deference ever appropriate in §1983 actions.

that the decision to dismiss in deference to parallel state court litigation does not rest on a mechanical check list. *Moses H. Cone Hospital*, *supra*, 460 U.S. at 16.

The Eleventh Circuit court is well aware of the special nature of §1983 actions and has in the past elaborated on the congressional intent and legislative history of this civil rights statute. In *Forehand v. Alabama Bank of Dothan*, 727 F.2d 1033, 1035 (1984), the court stated:

> Congress has determined the opportunity to proceed in a federal forum is necessary to protect the rights of section 1983 plaintiffs.

In *Duke v. James*, 713 F.2d 1506, 1510 (1983):

> Congress has deliberately afforded the section 1983 plaintiff an alternative forum. It is not for the courts to withdraw that jurisdiction which Congress has expressly granted under section 1983 where such a withdrawal is contrary to the purpose of Congress in extending that alternative forum.

In *Gilmere v. City of Atlanta, Ga.* 774 F.2d 1495, 1499 (1983):

> [t]he statutory grant of federal jurisdiction over section 1983 suits indicates that Congress . . . continues to adhere to the belief that police abuse is a sufficient threat to constitutional rights to warrant a 'federal remedy in federal court', citing *Monroe, supra*, 365 U.S. at 180.

In Patsy v. Florida Board of Regents, 475 U.S. 496, 502, this Court held that the exercise of federal jurisdiction under a federal statute should not be deferred unless it is consistent with congressional intent.

> [t]he very purpose of §1983 was to interpose the federal courts betwen the federal courts between the States and the people, as guardians of the people's federal rights -- to protect the people from unconstituional action under color of state law. *Patsy, supra*, at 457 U.S. 503 citing *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1880).

The courts below cannot justify disregarding the fact asserted in my district court pleadings, my appellate briefs, and my petition for rehearing, that the parties, issues, and damages are not the same in both forums, nor is complete relief cognizable in the state proceeding.[19] This blatantly defies the teaching of this Court in *Moses H. Cone Hospital*, 460 U.S. at 28:

> When a district court decides to dismiss or stay under *Colorado River*, it presumably concludes that the parallel state-court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties. If there is any substantial doubt as to this, it would be a serious abuse of discretion to grant the stay or dismissal at all." (emphasis added)[20]

19/ See Appendix, pages A-29, A-54 - A-55.

20/ Also see *Forehand*, *supra*, at 1035; *American Manufacturers Mutual Insurance Co.*, 743 F.2d 1519, 1525 (11th Cir. 1983); *Tovar v. Billmeyer*, 609 F.2d 1291 (9th Cir. 1980).

Admittedly, the state action is a mirror image of the federal suit. However, *there are twelve faces in the federal mirror that are not reflected in the state mirror.*

The language of 42 U.S.C. § 1983 is clear, unambiguous, and explicit:

> *Every person.* . .shall be liable. . .to the party injured in an action at law. . .for redress...,

therefore, if the writ is not granted, I will be denied the redress specified by Congress when it enacted §1983.

In this case, we clearly have a situation where the courts below could conclude that complete resolution of claims and issues cannot be determined in the state action.

There are elements associated with this case that fall within the parameters of *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411 (1964), where at U.S. 415 this Court stated:

> Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that 'When a Federal court is properly appealed to in a case over which it has by law jurisdiction * * * The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.' citing *Wilcox v. Consolidated Gas Co.*, 212 U.S. 19, 40. (1909).

The district court's order of dismissal of my suit states:

> [i]n light of the Plaintiff's egregious failure to prosecute this case, the Court will treat the Plaintiff as having elected to pursue his remedies in state court.

Since the court does not have the power to make such an election for me, it in essence has compelled me to accept a determination of my federal constitutional claims by a state court, *a forum which cannot resolve all of the issues surrounding my federal claims.*

My judicial posture on May 28, 1986 was the certainly no fault of mine. There was

no choice but to file complaints in two forums since the statute of limitations would have run the following day and the exercise of federal pendent jurisdiction over state law claims is discretionary.

Further, from the onset, my right to litigate my federal claims arising out of the same incident has been specifically reserved on the state court record. However, since my suit was dismissed and the statute of limitations has run, I am precluded from refiling an action in federal court.

The Eleventh Circuit, relying on its own case, *Collins v. Seaboard Coastline Railroad*, 681 F.2d 1333 (1982), held that the district court's order of dismissal does not require reversal. Again, the court has deprived me the benefit of sufficient and clear discussion.

Collins is not a §1983 case nor does it concern dismissal and surrender of federal jurisdiction. The only valid relationship to my case is that the proper role of appellate review is to remand for further proceedings when a discretionary decision has been made on false premises.[21]

Without wavering from the premise that dismissal was inappropriate, the district court should of at least stayed the action, *particularly since the statute of limitations had run.* Even then, this petition would have found it's way to this Court since a stay is just as much a refusal to exercise jurisdiction as a dismissal. *Moses H. Cone Hospital, supra*, 460 U.S at 28.

The district court had no discretion to dismiss rather than to stay claims for

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21/ See Appendix, page A-47.

monetary relief that cannot be redressed in the state proceeding. *Deakins v. Monaghan*, 108 S.Ct. 523, 529 (1988). The rule in other circuits is to stay rather than to dismiss actions because of parallel proceedings.[22]

Egregiousness implies a flagrantly bad showing. Admittedly, there has been egregiousness associated with this case. However, not on my part, but on the part of a system which precludes "judicial" indigents of vindicating violations of precious constitutional rights because of prohibitive litigation costs.

22/ [w]e cannot justify dismissing a claim for constitutional damages when the state forum is unable, as it is here, to grant that relief. *Williams v. Red Bank Bd. of Ed.*, 662 F.2d 1008, 1023 (3rd. Cir 1981). Also see *Crane v. Fauver*, 762 F.2d 325, 329 (3rd Cir. 1985); *Board of Educ. of Valley View v. Bosworth*, 713 F.2d 1316, 1322 (7th Cir. 1983); *University of Oklahoma, Gay People's Union v. Board of Regents, Etc.*, 661 F.2d 858, 860 (10th Cir. 1981); *Western Food Plan, Inc. v. J.D. MacFarlane*, 588 F.2d 778 (10th Cir. 1978).

In light of the discussion in *City of Riverside v. Santos Rivera*, 477 U.S. 561, this Court is well aware of the dilemma of prospective civil rights litigants. However, Riverside only defines the problem, it does not solve it. From experience, I can assure this Court there are not many attorneys, such as the ones in *Riverside*, who would gamble 1,946.75 hours on speculation they may prevail and might be fully compensated not only for their time, but for related costs of litigation as well.

Riverside, at U.S. 574-77 contains grave warnings:

> Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts.
>
> Most Americans. . .cannot afford to hire a lawyer if their constitutional rights are violated...
>
> [t]he public as a whole has an interest in the vindication of

> rights conferred by the statutes enumerated in §1988... "
>
> If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to vindicate goes unvindicated; and the entire nation, not just the individual citizen suffers."

I would add that whenever there is an encroachment on a citizens constitutional rights, and that person is denied his day in court, for whatever reason, cancer results. Each time this cancer is permitted to destroy another healthy cell, it weakens the entire system. Then, like a metastasized cancer, it eventually corrupts the whole body resulting in its demise.

If the congressional statements quoted in *Riverside* are to be meaningful, every §1983 action presents an issue of public importance because, cumulatively, each time relief under the Civil Rights Act is defeated, the meaning of §1983 will be

diminished. Needless to say, this presents the danger that the statute may ultimately be rendered virtually useless.

In this case, by dismissing my suit, not only did the district court foreclose my redress for civil rights violations, but it defeated one of the primary purposes of §1983. Since all enabling parties are only in the federal suit, it is only in the federal forum that complete adjudication can be had, a point of vital importance because §1983 is intended to serve as a deterrent against future constitutional violations. *Owens v. City of Independence*,, 445 U.S. 622, 651 (1980).

If there is to be uniformity among the circuit courts, a precise clarification of when the exercise of federal jurisdiction over §1983 actions can be surrendered is required. The mere fact that this petition is before this Court indicates there is a

problem involving an important federal jurisdictional issue.

Perhaps even more distressing than the violation of one's constitutional rights, is a brutal realization that those rights are reduced to nothing more than words on paper. In these bicentennial years, we are reminded of the value of these words, each one meticulously selected in the ratification process of our Constituion.

I would be remiss if I did not inform this Court that since entering the judicial arena, I have sensed an inimical attitude toward my pro se posture. I seek no special favors, but as a layman, I must rely on the wisdom and fairness of the courts. It would not seem unreasonable to expect clear and explicit explanations of decisions. However, I have yet to be afforded such consideration, by either the state or federal courts.

The law and precedent in this case is so clear and unambiguous that my suit should not have been dismissed, we are dealing here not only with abuse of discretion, but abuse of a pro se plaintiff as well. This in itself would appear to justify invoking the supervisory power of this Court if justice is to be done.

The late Justice Black, recognizing the plight of "judicial" indigents, stated:

> "No plaintiff's case shall be dismissed...because of the neglect, misfeasance, malfeasance,...of their counsel...and not then unless"...the party does or fails to do something ..."that can legally justify dismissal of the plaintiff's case."[23]

While they were not counsel of record, the misconduct and questionable ethics of two attorneys I retained is directly related

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23/ Federal Civil Judicial Procedure and Rules (West Publishing Co., 1988 Edition) page 11, suggested addition to Rule 41.

to the plight of this "judicial" indigent.[24] However, there has been absolute compliance on my part with the mandates of the district court from the time jurisdiction attached.

This petition is being read only by the grace of God, the blessing of a good education, the ability to type, and sufficient resources to arm myself with a home word processor. Truly a "judicial" David and Goliath scenario considering the financial and legal resources of the defendants.[25]

The culmination of my efforts is finding myself here, after great time and expense, addressing the highest Court of the land, without ever having seen the eyeballs of a federal judge, again subject to a discretionary stroke of a pen and one mere

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24/ See Appendix, pages A-14 - A-18; A-26; A-48.

25/ See Appendix, pages A-40 - A-41.

word, either granting this writ or denying me forever the redress I am entitled to by law.

CONCLUSION

The writ should be granted because of the direct and apparent conflict of the decision of the court below with decisions of this Court and decisions of other circuit courts of appeals, and because "the whole nation suffers" if the violation of my constitutional rights are unvindicated.

DONALD PRUESSMAN
7713 S.W. 88th. St. #A-216
Miami, Florida 33156
Telephone: (305) 595-0886

APPENDIX

INDEX TO APPENDIX

Opinion and Decision of the Eleventh Circuit Court of Appeals . A-2

Order of Dismissal A-6

Order to Show Cause A-9

Response to Order to Show Cause . . . A-11

Order Quashing Order to Show Cause . A-21

Order Dismissing State Claims A-23

Motion to Vacate Order of Dismissal . A-25

Order Denying Motion to Vacate Order of Dismissal A-42

Order Denying Motion to Dismiss Appeal A-43

Petition for Rehearing A-44

Order Denying Petition for Rehearing A-58

Judgment Entered as Mandate A-59

Amendment I, U.S. Constitution . . . A-61

Amendment IV, U.S. Constitution . . . A-61

Amendment V, U.S. Constitution . . . A-61

Amendment VIII, U.S. Constitution . . A-62

Amendment XIV, U.S. Constitution . . A-62

42 U.S.C. §1983 . . . . . A-63

28 U.S.C. §1343 . . . . . A-64

DO NOT
PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-5309
Non-Argument Calendar

D.C. Docket No. 86-1140

DONALD PRUESSMAN,
Plaintiff-Appellant,

versus

GORDON LEWIS, et al.,
Defendants-Appellees.

Appeal from the
United States District Court for
the Southern District of Florida

(December 19, 1988)

before FAY, VANCE and KRAVITCH, Circuit Judges.

PER CURIAM:

Donald Pruessman filed this civil rights action in district court on May 28, 1986 alleging that his confinement in the Community Health Center of South Dade

deprived him of his liberty without due process of law. In his amended complaint he stated claims under 42 U.S.C. § 1983 and state law. On the same day he filed in state court a second suit arising out of the same incident. The state proceeding also seeks relief under both state law and 42 U.S.C. § 1983.

For nearly a year and a half nothing happened: the defendants were not served, and this case lay dormant. Finally, the district court issued a sua sponte order directing that Pruessman show cause why the case should not be dismissed for lack of prosecution. Pruessman responded that he had suffered health problems and had a dispute with his attorney. On November 24, 1987 the district court quashed the show cause order but ordered plaintiff to effect service on all parties. During January 1988 he effected service on some but not all

defendants. Nothing further of significance has taken place in connection with his prosecution of the case.

Defendants moved to dismiss, disclosing to the district court the pendency of the state court action. Defendants also represented that service of process had been perfected in the state action in April 1987 and that discovery had taken place and was continuing in the state action.

On February 8, 1988 the district court dismissed the case holding that plaintiff elected to pursue the state action "particularly in light of the plaintiff's egregious failure to prosecute this case."

To the extent that the district court's order indicates that a proceeding in state court is invariably a bar to proceedings concerning the same matter in federal court, it is in error. Colorado River Water Conservation District v. United States, 424

U.S. 800 (1976); Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 23-26 (1983); Noonan South, Inc. v. County of Volusia, 841 F.2d 380 (11th Cir. 1988). Notwithstanding the district court's questionable statement of law, our evaluation of the factors listed in Colorado River and Moses H. Cone establish that its order of dismissal does not require reversal. See Collins v. Seaboard, 681 F.2d 1333, 1335 (11th Cir. 1982). In reaching this determination we have given particular weight to the progress of the litigation in state court and the exceptional circumstances constituting Pruessman's "egregious failure to prosecute this case." AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-1140-CIV-SPELLMAN

DONALD PRUESSMAN,

Plaintiff,

-vs-

GORDON LEWIS, et al.,

Defendant.
_____/

ORDER OF DISMISSAL

THIS CAUSE comes before the Court upon Defendants' Motion to Dismiss, Quash and/or Abate/Stay Plaintiff's Complaint. Upon careful review of the record, it appears that on the same day that the Plaintiff filed the instant Action, he filed a complaint arising out of the same events and seeking substantially identical relief in state court. This was clearly not within the contemplation of Congress when it created concurrent jurisdiction for civil rights actions in 28 U.S.C. section 1343.

A civil rights litigant may choose *between* a federal and state forum; he may not, however, maintain two such actions concurrently. The Court finds no good faith basis for the simultaneous institution and the continued maintenance of these complaints by the Plaintiff in two different courts. *See* Fed. R. Civ. P. 11. The Court notes that this is not the situation in which two different parties institute lawsuits in different courts to adjudicate claims arising out of the same transaction or incident. Moreover, particularly in light of the Plaintiff's egregious failure to prosecute this case, the Court will treat the Plaintiff as having elected to pursue his remedies in state court. Accordingly, it is hereby

ORDERED AND ADJUDGED that the Defendants' Motion to Dismiss is GRANTED, and this case is dismissed.

DONE AND ORDERED in Chambers at Miami, Florida this 8 day of February, 1988.

Eugene P. Spellman
UNITED STATES DISTRICT JUDGE

cc: all counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-1140-CIV-SPELLMAN

DONALD PRUESSMAN,

Plaintiff

v. ORDER TO SHOW CAUSE

GORDON LEWIS, et al.,

Defendants.
_____/

THIS CAUSE is before the Court sua sponte. A review of this case indicates that a complaint was filed on May 28, 1986 with summonses issued on that same date.

No further activity has taken place since that time. It is therefore,

ORDERED AND ADJUDGED that Plaintiff shall show good cause to this Court within twenty (20) days from the date of this Order why this case should not be dismissed pursuant to Rule 4(j), Federal Rules of Civil Procedure and Rule 13, Local Rules for the

United States District Court, Southern District of Florida.

Failure to respond to this Order shall result in dismissal of this action without further notice.

DONE AND ORDERED, at Miami, Florida this 2d day of October, 1987.

Edward P. Davis
UNITED STATES DISTRICT JUDGE
FOR: EUGENE P. SPELLMAN

cc: Donald Pruessman, Pro Se

October 19,1987

The Honorable Eugene P. Spellman
United States District Court
Southern District of Florida
301 N. Miami Avenue - 7th Floor
Miami, FL 33128

ORDER TO SHOW CAUSE
CASE NO. 86-1140-CIV-SPELLMAN

Dear Judge Spellman:

This is in response to your October 2, 1987 Order to Show Cause why the above referenced case should not be dismissed.

First of all, please forgive me if I should make any procedural errors as I am not an attorney, merely a layman attempting to obtain redress for a violation of his civil and constitutional due process rights to the best of his ability and means.

I am a disabled individual with Multiple Sclerosis, a condition which has made it most difficult for me to pursue a redress of grievances for a serious breach of said rights as a result of unwarranted and

improper implementation of the Florida Mental Health (Baker) Act.

Since the incident subject of my complaint occurred on May 28, 1982, between numerous hospitalizations and at great physical effort and financial expense and over the course of three years, I exhausted all known avenues to obtain redress through administrative complaints, even to the extent of personally discussing the matter with then Governor Bob Graham who arranged for me to go to Tallahassee and address the issue. Unfortunately, the result of all complaints boiled down to the fact that if provisions of the Baker Act are abused and/or if individual rights are violated, the only remedy available to victims is a civil action.

While my personal experience created a great deal of mental anguish, a much more significant issue surfaced which continues

to plague me. That a State Law (Act) exists which grants certain individuals the extraordinary power to order a person to be taken into custody and deprived of his or her liberty without any opportunity for that person to protest and that the State affords no realistic protection or practical remedy of victims of abuse of said law.

It is true that a civil action remedy is available, however, such a course of action is beyond the financial or educational capabilities of most individuals who are subjected to abuses of the Baker Act. I can affirm from personal experience that to obtain affordable Counsel is most difficult, primarily because of the question of damages which I assume is predicated on the fact that civil rights cases seek to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms.

In August of 1985, I retained Legal Counsel who agreed to representation on a contingency plus cost basis, the only kind of arrangement I could realistically afford. Then, on May 23, 1986, just two working days prior to expiration of the Statute of Limitations and at a time I was experiencing serious complications with my health, said attorney advised me she would no longer handle my case on the agreed upon basis, but wanted an open ended hourly fee, plus costs and percentage of aware arrangement. Since there was no way I could financially commit myself to such an arrangement, the result was that my State claim was filed in State Court and my Federal Claim in Federal Court on a "Pro Se" basis.

The stress associated with the above described incident exacerbated my condition resulting in hospitalizations, period of recuperation and further limitations on my

ability to pursue new Counsel. I was aware of the 120 day service requirement, however, due to circumstances totally beyond my control: (1) the condition of my health; and (2) lack of representation, I could not possibly effect service and had to rely on the provision to show good cause at the appropriate time.

It was not until April of 1987 that I was able to retain affordable Counsel to whom I had given both my State and Federal complaints, supposedly with the understanding that my civil rights cause of action would be pursued. Counsel was retained on an affordable non-refundable flat fee plus costs and percentage of award basis.

At the time new Counsel was retained, I was already aware that a civil rights cause of action under 42 USC 1983 could be brought forth in either State or Federal Court and

this point was discussed. I was not aware, nor was I made aware of certain technicalities and details which have led to my current dilemma, a description of which follows.

Due to a prolonged period of continued hospitalization immediately following retention of the above referenced Counsel (April 17 to July 31, 1987), I was unable to follow matters closely. It did however come to light that my case was being treated as everything but a civil rights action. Counsel had not amended my State complaint to incorporate my civil rights cause of action under 42 USC 1983 but in April of 1987, had merely served a duplicate of my "Pro Se" complaint.

For numerous reasons, Counsel was ordered to amend the original State complaint which he did on September 14, 1987. As a result of my discussions with Counsel during which

I pointed out the fact that my primary concern, the violation of my civil rights, had not been addressed, Counsel incorporated my 42 USC 1983 cause of action into the amended complaint.

It was receipt of your Order to Show Cause that prompted me to further research the status of my civil rights claim and make specific inquiries as to just where I exactly stood with this matter. As a result, I now discover that if the 42 USC 1983 cause of action had been incorporated into the initial State complaint served, it could have well been dismissed because the Statute of Limitations had run. Needless to say, I can only assume that the same holds true for the amended complaint filed on September 14, 1987.

Another significant factor is that I was not advised by Counsel at the onset to pursue my civil rights cause of action

elsewhere because his employer does not desire to pursue litigation in Federal Court, a fact only recently made known to me.

Had I been advised by Counsel at the onset concerning the aforementioned technicalities and informed that he would not pursue my civil rights cause of action in Federal Court if need be, I would have pursued Counsel elsewhere and most likely, Defendant's would have been served with my Federal complaint by now.

I am now faced with another problem in that I am literally without benefit of counsel as my attorney has been suspended from practice for a ninety day period effective November 1, 1987. This now requires me to obtain advice as to just how this will affect my State case and the manner in which I should proceed.

My State case is currently in the stage of discovery whereby I have executed extensive interrogatories and have responded heretofore to interrogatories initiated by Defendants. A hearing is scheduled for October 28, 1987 to entertain various motions, including those to dismiss.

After the "hands on" legal education I have received, it seems as though my Federal Claim can best be addressed in the Federal Court. Therefore, I request your Honor not to dismiss my complaint and permit me to proceed diligently to the best of my ability.

I do not believe Defendant's would be prejudiced as they are defending a like cause of action in State Court. Furthermore, paragraph 50 of my original State complaint states: "Plaintiff specifically reserves his federal claims arising from the same transaction and

occurrence for litigation in the United States District Court."

If the Court is inclined to dismiss my complaint, I respectfully request a hearing before such dismissal at which time I will be happy to provide documentation to support the aforementioned circumstances.

In conclusion, your Honor, I can only reiterate that I am not an attorney, merely a citizen in pursuit of justice and who desires to address an important civil rights issue. Therefore, I must appeal to your understanding of my circumstances and events which have occurred beyond my control.

Very truly yours,

Donald R. Pruessman
DONALD R. PRUESSMAN
Plaintiff

ADDRESS REPLY:
11403 S.W. 81st ROAD
MIAMI, FL 33156

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-1140-CIV-SPELLMAN

DONALD PREUSSMAN,

Plaintiff,

-vs-

GORDON LEWIS, et al., ORDER QUASHING ORDER TO SHOW CAUSE

Defendant. /

THIS CAUSE comes before the Court upon Plaintiff's Response to this Court's Order to Show Cause why this case should not be dismissed for failure to prosecute. The Plaintiff, who is proceeding pro se in the face of severe physical and financial hardship, would be unable to refile this action if it were dismissed because the applicable statute of limitations has run. Accordingly, it is hereby

ORDERED AND ADJUDGED that the Order to Show Cause is QUASHED. Plaintiff is Ordered to effect service upon all parties within 45

days of the date of this Order, or, if he desires, to file immediately an appropriate affidavit to proceed in forma pauperis. After service is effected, the Plaintiff shall proceed EXPEDITIOUSLY with the prosecution of this case.

DONE AND ORDERED in Chambers at Miami, Florida this 24 day of November, 1987.

Eugene P. Spellman
UNITED STATES DISTRICT JUDGE

cc: all counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 86-1140-CIV-SPELLMAN

DONALD PREUSSMAN,
Plaintiff,
-vs-
GORDON LEWIS, et al,
Defendants./

ORDER DISMISSING STATE CLAIMS
AND EXTENDING TIME FOR
SERVICE AN ADDITIONAL 45 DAYS

THIS CAUSE comes before the Court upon review of the Plaintiff's Response to this Court's Rule to Show Cause which clearly indicates the pendency in state court of a case arising out of the same incident underlying this Complaint. Moreover, Counts II, III, & IV of Plaintiff's First Amended Complaint present matters purely of state law. The Court is of the opinion that it would be inappropriate and inefficient to litigate these matters in Federal Court as well, and thus, declines to exercise jurisdiction over these counts of the complaint.

As to the sole count of this complaint presenting a matter of federal law--Count I--the Court extends the time during which the Plaintiff may effect service on the Defendants for an additional 45 days from the date of this Order. Accordingly, it is hereby

ORDERED AND ADJUDGED that this Counts II, III & IV of the First Amended Complaint are hereby DISMISSED and that the Plaintiff shall have 45 days from the date of this Order to effect service on all Defendants. The Plaintiff is further warned that the Court intends to hold the Plaintiff strictly to the terms of its Order of November 24, 1987.*

DONE AND ORDERED in Chambers at Miami, Florida
this 28 day of January, 1987.

Eugene P. Spellman
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-1140-CIV-SPELLMAN

DONALD PRUESSMAN,

Plaintiff,

vs.

GORDON LEWIS, DR. JOHN T. MacDONALD FOUNDATION, d/b/a DOCTORS HOSPITAL, et al.,

Defendants

_____/

MOTION TO VACATE ORDER OF DISMISSAL
OR FOR FURTHER HEARING AND MEMORANDUM OF LAW

I, DONALD PRUESSMAN, plaintiff, move this Court to vacate it's Order of Dismissal dated February 8, 1988, or in the alternative, grant a further hearing on this motion, and as grounds therefore state as follows:

(a) Through administrative complaints to all known applicable state agencies, I exchaused all avenues to redress violation of my federal rights, privileges and immunities guaranteed by the Constitution of the United States.

(b) I simultaneously filed my state claims in the state court and my federal claim in federal court.

(c) My federal claim had been incorporated in my first amended state complaint, and in that complaint I reserved the right to litigate my federal claim in the federal court.

(d) My federal claim can best be addressed in a federal forum.

(e) As a result of my attorneys' misfeasance and nonfeasance, my federal complaint was not timely served.

2. It is interesting to note the comments by Justice Black on page 11 of the Federal Rules of Civil Procedure referenced in this Court's order of February 8, 1988, *"No plaintiff's case shall be dismissed...because of the neglect, misfeasnace, malfeasance...of their counsel"*.

3. As a result of my response showing <u>good</u> cause why my complaint should not be

dismissed, on November 24, 1987, this Court quashed it's Order to Show Cause dated October 2, 1987 and further ordered that I effect service on all parties within forty-five (45) days.

4. Accordingly, as a result of my research with respect to the complexity of actions under 42 U.S.C. §1983, and in order to better proceed expeditiously with the prosecution of this case as ordered by this Court, I amended my original complaint so as to serve defendants with a proper complaint.

5. In compliance with this Court's order and pursuant to Federal Rule of Civil Procedure 4(c)(2)(C)(ii) permitting service by first class mail, I served all defendants. In fact, I went beyond this this requirement by serving all defendants by certified mail on January 5, 1988, a date within the confines of this Court's November

6. It was never my desire to litigate

in both the state and federal courts. Complaints were filed in state and federal courts only as a result of advice given me by counsel only two working days prior to the expiration of the statute of limitations, at a time when I had only a limited knowledge of correct procedure.

7. Upon researching law under 42 U.S.C. §1983, it became apparent that the federal court could assert jurisdiction over not only my federal claim, but also those pendant state tort claims. I therefore incorporated my state claims in my federal action intending to dismiss my entire state complaint when issues were joined in federal court.

8. Subsequent to this Court's order of January 28, 1988 dismissing my state claims, and prior to this Court's order of February 8, 1988 dismissing my entire complaint, I was in the process of amending my state

complaint intending to dismiss my §1983 claim from said complaint.

9. It should be noted that the following defendants are named in the federal complaint but not in the state action: JOSEPH F. McALOON; STUART L. SMITH; L.C. SMALL; GLENN FALK; JOHN H. TRENHOLM; JEROME BELOFF; ANGEL DIAZ; MICHAEL ROBINGSON; and police officers KEN BUSH, R. POOR, RICHARD J. NAUE. Also a request for declaratory relief lies only in my federal complaint. Therefore, there are different parties and divergent issues in the state and federal forums.

10. *It should be further noted that motions by defendants denying liability under 42 U.S.C. §1983 are pending in the state court.*

MEMORANDUM OF LAW

11. There is no doubt that concurrent jurisdiction exists in both state and

federal courts in the litigation of 42 U.S.C. §1983 actions. Terry v. Kolski, 78 Wis 2d 475, 254 N.W.2d 704 (1977).

12. The general rule is that the dismissal of a federal case, when concurrent jurisdiction exists, is only warranted in "exceptional circumstances". Colorado River, supra, page 818. The circumstances have to be "carefully balanc[ed]...with the balance heavily weighted in favord of the excercise of jurisdiction". Cone Memorial Hospital v. Mercury Construction Corporation, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

13. The circumstances to be weighed are: (1) the court's assumption of jurisdiction over property; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which jurisdiction was obtained by concurrent forums; (5) the absence of any substantial progress in the federal court

litigation; (6) the presence in the suit of extensive rights governed by state law; (7) the geographical inconvenience of the federal forum and; the government's previous willingness to litigate similar suits in state court.. Cone, supra. None of these circumstances by itself would justify the surrender of federal jurisdiction. Each circumstance must be weighed according to the facts of each individual case. In order to overcome the balance already weighted in favor of the federal exercise of jurisdiction, the burden lies with the defendant to show, by a great preponderance, factors which would tip the scales for surrender of federal jurisdiction.

14. In my case, there is no property over which to assume jurisdiction. My case deals solely with federally guaranteed personal rights. It also deals with federal law issues and their "presence...must always

be a major consideration weighing against surrender." Cone, supra, 460 U.S. at page 26.

15. There is no geographical burden arising from the two forums in my case. The observation is made that in Kerotest Mfg. Co. v. CO-2 Fire Equipment Co., 342 U.S. 180, 72 S.Ct. 219, 96 L.Ed. 200 (1952), the two forums involved were Delaware and Illinois; in Microsoftware Computer Systems v. Ontel Corp., 686 F.2d 531 (7th Cir. 1982), the forums were New York and Illinois; in Evans Trans Co. v. Scullen Steel Co., 530 F.Supp. 787 vacated, 693 F.2d 715 (D.C. Ill. 1982), the forums involved Missouri and Illinois.

16. As can be noted, *the cases cited by defendant LEWIS are a far cry from three city blocks which is the distance between the federal and state court in Miami.*

17. When both forums are in the same city, a geographic burden does not exist. Heritage Land Co. v. Federal Deposit Ins. Co., 316 U.S. 491, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942).

18. Further, in Microsoftware, supra, there was no peculiarly federal interest in the action; in Evans, supra, exclusively state law was involved; and Kerotest, supra, was a patent dispute. None of these cases involved a civil rights action.

19. The state court did not have jurisdiction of the federal claim in my case until the filing of the first amended complaint on September 14, 1987. The federal court had first jurisdiction since the federal complaint was filed on May 28, 1986.

20. Virtually no progress has been made in the state court action. All interrogatories are reply with objections

and none are yet complete. Defendant LEWIS' counsel has implied there would be a rocky road before the state action would be at issue and is fulfilling that implication (SEE EXHIBIT "B").

21. Additionally, the state action is also bogged down because there has been a plurality of Judges attempting to hear motions from all parties. Five separate justices have heard multiple motions and the case still is not assigned a permanent Judge, resulting in conflicting orders and creating general confusion. I have moved for a case management conference in order to expedite the state action, but the earliest date available is March 15, 1988.

CONCLUSION

22. It is clear from the foregoing that I never intended to have the state court hear my substantial federal question.

23. The federal court had first jurisdiction over my 42 U.S.C. §1983 claim.

24. There are no geographical or undue financial burdens in hearing my federal issue in federal court and my state claims in state court. What lies in my case is a series of civil wrongs which by themselves constitute common law torts properly before a state court. However, each common law tort by itself, or in combination as alleged in my complaint, constitute a violation of civil rights under 42 U.S.C. §1983 and raise a substantial federal question whose proper forum is in federal court.

25. There is no doubt that this court may and should retain jurisdiction over the substantial federal question involved under 42 U.S.C. §1983. Further, if this Court is inclined, it may also hear my pendant common law tort claims.

26. I have conformed to this Court's order of November 24, 1987 in all respects as to timely service upon defendants as evidenced by "Exhibit "A". Further, it would seem that defendants GORDON LEWIS, CITY OF CORAL GABLES, KEN BUSH, R. POOR, D. MOORE, RICHARD J. NAUE, JR., and GLENN FALK have acknowledged service by arguing the merits of their case in their Motions and Memorandums of Law.

27. This Motion and Memorandum of Law only concerns the question before the Court at this time, which is jurisdiction overy my substantial federal claim. If this Court grants my petition and reinstates it's previous order of January 28, 1988, I will file and serve a Memorandum of Law in response to the remaining defenses alleged by defendants.

WHEREFORE, I respectfully request this Court to reconsider this matter and based on

the foregoing facts and circumstances, vacate it's Order of Dismissal of February 8, 1988, or in the alternative, if this Court is inclined not to vacate said order, I then request a further hearing on this motion.

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 19th day of February, 1988, to the parties indicated on the attached mailing list.

DONALD PRUESSMAN
11403 S.W. 81st Road
Miami, Florida 33156
(305) 253-6847
Plaintiff

Donald Pruessman
DONALD PRUESSMAN

SCHEDULE OF SERVICE

(Mailed 1/5/88)

Received by Defendant	Date Received	Date Defendant signed "Notice and Acknowledgement of Summons and Complaint" Form
(1) GORDON LEWIS	1/6/88	1/20/88
(2) DOCTORS HOSPITAL	1/6/88	FORM NOT RETURNED
(3) JOSEPH F. McALOON	1/7/88	FORM NOT RETURNED
(4) STUART L. SMITH	1/6/88	FORM NOT RETURNED
(5) L. C. SMALL	1/6/88	FORM NOT RETURNED
(6) CITY OF CORAL GABLES	1/7/88	FORM NOT RETURNED
(7) KEN BUSH	1/7/88	FORM NOT RETURNED
(8) R. POOR	1/7/88	FORM NOT RETURNED
(9) D. MOORE	1/7/88	FORM NOT RETURNED
(10) RICHARD J. NAUE	1/7/88	RETURNED UNDATED

EXHIBIT "A"

Received by Defendant	Date Received	Date Defendant signed "Notice and Acknowledgement of Summons and Complaint" Form
(11) GLENN FALK	1/7/88	1/11/88
(12) CHI	SEE NOTE (1)	FORM NOT RETURNED
(13) JOHN H. TRENHOLM	SEE NOTE (2)	SEE NOTE (2)
(14) JEROME BELOFF	1/6/88	1/7/88
(15) ANGEL DIAZ	1/12/88	1/13/88
(16) MICHAEL ROBINSON	SEE NOTE (2)	SEE NOTE (2)

NOTES:

(1) Return Receipt was returned signed but without date.

(2) Returned "Addressee Unknown"

EXHIBIT "A"

AFFIDAVIT

RE: PRUESSMAN v LEWIS
CASE NO. 86-22648 CA 01

I, LOUIS B. STOSKOPF, former counsel for plaintiff DONALD PRUESSMAN, SAY:

During a hearing before the Honorable Judge Sam Silver on October 28, 1987, defendant GORDON LEWIS' counsel, EVELYN MERCHANT, proffered to the Court that she would file a Memorandum of Law in support of defendant LEWIS' opposition to plaintiff's objections to interrogatories propounded by defendant LEWIS.

On November 2, 1987, the Honorable Judge Sam Silver ordered that ruling on objections by plaintiff would be withheld pending filing of Memoranda of Law by defendant LEWIS. The Court further ordered that plaintiff shall have fifteen days from said

filing in which to file a reply Memorandum. To this affiant's knowledge, defendant LEWIS has never complied with the order.

Subsequent to said hearing, defendant LEWIS' counsel, EVELYN MERCHANT, telephonically conversed with the affiant and during the course of said conversation suggested that she was authorized and prepared to utilize the full capabilities of her law firm to maximize filed pleadings and all discovery against the plaintiff. This affiant took this statement to imply that defendant LEWIS' counsel would attempt to bury plaintiff in legal paperwork, regardless of necessity, and at whatever cost and/or expense.

Louis B. Stoskopf
LOUIS B. STOSKOPF

SIGNED AND NOTARIZED
JANUARY 14, 1988

EXHIBIT "B"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-1140-CIV-SPELLMAN

DONALD PRUESSMAN,
Plaintiff,

-vs-

GORDON LEWIS, et al.,
Defendants.
_____/

ORDER DENYING MOTION TO
VACATE ORDER OF DISMISSAL

THIS CAUSE comes before the Court upon Plaintiff's Motion to Vacate Order of Dismissal. Upon careful review of the record, it is hereby

ORDERED AND ADJUDGED that this Motion is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida this 23 day of March, 1988.

Eugene P. Spellman
UNITED STATES DISTRICT JUDGE

cc: all counsel of record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 88-5309

DONALD PRUESMAN,

Plaintiff, Appellant,

versus

GORDON LEWIS, et al.,

Defendants-Appellees.

Appeal from the United States
District Court for the
Southern District of Florida

Before RONEY, Chief Judge, HATCHETT and ANDERSON, Circuit Judges

BY THE COURT:

Appellees' motion to dismiss is denied. The motion to vacate, construed as a Fed.R.Civ.P. 59(e) motion, was timely served. Fed.R.Civ.P. 6(a), 59(e). The notice of appeal was, therefore, timely. Fed.R.App.P. 4(a)(1); Campbell v. Wainright, 726 F.2d 702, 703 (11th Cir. 1984).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CASE NO. 88-5309

DONALD PRUESSMAN
Appellant

v.

GORDON LEWIS, M.D.; DR. JOHN T. MacDONALD FOUNDATION, a Florida Corporation d/b/a DOCTORS HOSPITAL; JOSEPH F. McALOON, Administrator of Doctors Hospital; STUART L. SMITH, an Administrator of Doctors Hospital; L.C. SMALL, an Administrator of Doctors Hospital; CITY OF CORAL GABLES, a Municipality; KEN BUSH, Chief of Police, City of Coral Gables; R. POOR, a Coral Gables Police Officer; D. MOORE, a Coral Gables Police Officer; RICHARD J. NAUE, JR.; a Coral Gables Police Officer; GLENN FALK, Legal Advisor, City of Coral Gables Police Department; COMMUNITY HEALTH OF SOUTH DADE, INC., a Florida Corporation; JOHN H. TRENHOLM, Executive Director of Community Health of South Dade, Inc.; JEROME BELOFF, M.D., Medical Director of Community Health of South Dade, Inc.; ANGEL DIAZ, M.D., an employee or agent of Community Health of South Dade, Inc.; MICHAEL ROBINSON, an employee of Community Health of South Dade, Inc.,

Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

APPELLANT'S PETITION FOR REHEARING

DONALD PRUESSMAN
7713 S.W. 88th. St. #A-216
Miami, Florida 33156
(305) 595-0886

CERTIFICATE OF INTERESTED PERSONS

District Court Judge:
Honorable Eugene P. Spellman

Appellant (Plaintiff):
Donald Pruessman

Appellees (Defendants):
Gordon Lewis, M.D.
Dr. John T. MacDonald Foundation d/b/a
Doctors Hospital
Joseph McAloon
Stuart L. Smith
L.C. Small
City of Coral Gables (a Municipality)
Ken Bush
R. Poor
D. Moore
Richard J. Naue, Jr.
Glenn Falk
Community Health of South Dade, Inc.
John H. Trenholm
Jerome Beloff
Angel Diaz
Michael Robinson

Counsel:
Appellant:
Appellant Donald Pruessman is "pro se"

Appellees:

For Gordon Lewis:
F. Laurens Brock, Esq.

For City of Coral Gables
Ken Bush
R. Poor
D. Moore
Richard J. Naue, Jr.

For Glenn Falk
Michael A. McGrane, III

Appellees served but no appearance by Counsel:

Dr.John T.MacDonald Foundation d/b/a Doctors Hospital
Joseph A. McAloon
Stuart L. Smith
L. C. Small
Community Health of South Dade, Inc.
John H. Trenholm
Jerome Beloff
Angel Diaz
Michael Robinson

All persons listed in any other party's certificate of interested persons.

APPELLANT'S PETITION FOR REHEARING

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, I, Appellant DONALD PRUESSMAN, respectfully petition this court for a rehearing of its decision dated December 19, 1988 and in support thereof state as follows.

The per curiam decision of this Court tells me that it is imperative to examine the premises upon which discretion is exercised. Collins v. Seaboard Coastline R. Co, 681 F.2d 1333 (11th Cir. 1982). As shown below, it would seem that both this Court and the District Court have either overlooked or misapprehended the premises upon which the District Court exercised its discretion.

I.

OCTOBER 2, 1987

DISTRICT COURT'S ORDER TO SHOW CAUSE (R1-3)

In my response to the above order, on October 19, 1987, I made the following

disclosures to the District Court:

(a) I had filed actions in both federal and state courts. (R1-4-3);

(b) My state action had been served in April of 1987. (R1-4-4);

(c) I was aware of the 120 day service provision in the federal rules but that due to circumstances beyond my control, I could not possibly have effected service on the defendants and had to rely on the provision to show good cause at the appropriate time. (R1-4-3);

(d) The nonfeasance and misfeasance of the attorneys I had retained to prosecute my actions. (R1-4-pages 3, 4 & 5);

(e) The status of the proceedings in the state action at that point in time. (R1-4-6).

MISAPPREHENSION OR OVERSIGHT OF THE PREMISES:

On page 2 of this Court's per curium decision it was stated:

> "Defendants moved to dismiss, disclosing to the district court the pendency of the state court action. Defendants also represented that service of process had been perfected in April, 1987 and that discovery had taken place and was continuing in the state action."

CORRECT PREMISES:

It was my pleading dated October 19, 1987 that disclosed all of the above matters to the District Court. (R1-4). There were no communications or disclosures or otherwise between the court and any of the defendants until January 25, 1988.

II.
NOVEMBER 24, 1987
DISTRICT COURT'S ORDER
QUASHING ORDER TO SHOW CAUSE (R2-19)

In the above order, the District Court stipulated that I:

> "...effect service upon all parties within 45 days..." and "After service is effected...shall proceed EXPEDITIOUSLY with the prosecution of this case."

MISAPPREHENSION OR OVERSIGHT OF THE PREMISES:

On page 2 of this Court's per curium decision, it was stated:

> "During January 1988 he effected service on some but not all defendants. Nothing further of significance has taken place in connection with his prosecution of the case."

and on page 3, this Court stated:

> "In reaching this determination we have given particular weight to..exceptional circumstances constituting Pruessman's 'egregious failure to prosecute this case.'

CORRECT PREMISE:

Service was effected on all parties during January of 1988 as evidenced in my Motion to Vacate Order of Dismissal or For Further Hearing and Memorandum of Law dated February 19, 1988. (R1-17-pgs. 2, 7, and Exhibits "A" through "A"(16). In that pleading, the District Court was informed that service had been effected on all parties on January 5, 1988. Forty-Five days from the District Court's order (dated November 24, 1987) was January 8, 1988. The matter of service was also delineated on pages 8 and 9 of my initial brief and on pages 3, 4, and 5 of my reply brief.

There was no egregious failure on my part to prosecute this case. After effecting service, I proceeded "EXPEDITIOUSLY" with prosecution of the action. I would ask this Court what further action I should have taken since no responsive pleadings or motions were filed by any of the defendants until January 25, 1988, a mere thirteen days prior to the District Court's February 8, 1988 Order of Dismissal of the entire action. (R1-16). Obviously, nothing further of significance with the prosecution of the action would have taken place in such a short period of time.

III.
JANUARY 28, 1988
DISTRICT COURT'S ORDER DISMISSING
STATE CLAIMS AND EXTENDING TIME FOR
SERVICE AN ADDITIONAL 45 DAYS (R1-13)

The portion of the above order which extends the time to effect service on defendants an additional 45 days was unnecessary since service had already been

effected on all parties. Obviously, when the District Court issued the order, it was unaware that service had been effected.

The misapprehension or oversight of this vital premise constitutes the source of the District Court's unwarranted use of the term "egregious".

IV.

FEBRUARY 8, 1988

DISTRICT COURT'S ORDER OF DISMISSAL (R1-16)

This order, being based on false premises, should be vacated and remanded to the District Court for further proceedings or any other relief this Court may deem proper. Collins, supra.

V.

PROGRESS OF THE LITIGATION IN THE STATE COURT

On page 3 of its per curiam decision, this Court stated:

> "In reaching this determination we have given particular weight to the progress of the litigation in state court. . ."

Obviously, this court has overlooked or

misapprehended the fact that no progress had been made in the state court as indicated on page 12 of my initial brief and pages 9 and 10 of my reply brief.

Since that time, only one deposition has been taken, and certainly that fact does not connote "progress". Further, on September 29, 1988, the status quo was perpetuated when the state court abated the action and stayed all discovery. [SEE ATTACHED EXHIBIT "A"].

On page 9 of my reply brief, I indicated to this Court that there had been a plurality of judges entertaining and ruling on motions. I am now informed that Judge Klein who abated the action will no longer preside and the case has been transferred to another judge who is unfamiliar with the issues.

Also, on page 9 of my reply brief, I indicated that the earliest date available

for hearing the defendants motions to dismiss was October 21, 1988. To date, said motions have not been heard and there have been no answers to my Third Amended Complaint.

I continue to find myself having to contend with an inimical attitude toward my pro-se posture which I indicated on page 11 of my reply brief. I equate each pleading to be a ticket to see a "parade of the horribles".

VI.

THE STATE COURT CANNOT RESOLVE ALL OF THE ISSUES PRESENTED IN MY FEDERAL ACTION

Since this matter was not addressed, obviously this Court overlooked or misapprehended the above matter delineated on page 11 of my initial brief which states:

> ". . .the state suit cannot resolve all of the issues set forth in the federal action since there is no declaratory relief in the state suit, the parties are not identical, and the elements for punitive damages are not the same.";

and on page 10 of my reply brief which states:

> ". . .the inadequacy of this state court to protect my rights. . .(and). . .I am precluded from realizing both my monetary damages and declaratory judgment rights since all the parties in the federal action are not parties in the state action.";

and also on page 12 of my reply brief which states:

> ". . .the issues of damages and my prayer for declaratory relief are distinctly different in both action. [sic] Without all of the parties in interest before the Court, a declaratory judgement will be off little effect, and punitive damages will not be a deterrent unless all enabling parties are included."

WHEREFORE, I request that this Court conduct a rehearing of this matter taking into consideration and weighing the various facts overlooked or misapprehended as pointed out in this petition.

Respectfully submitted,

Donald Pruessman
DONALD PRUESSMAN
Appellant - Pro Se

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 86-22648 (CA 01)

DONALD PRUESSMAN,

Plaintiff,

vs.

GORDON LEWIS, DR. JOHN T. MacDONALD FOUNDATION doing business as DOCTORS HOSPITAL, CITY OF CORAL GABLES, and COMMUNITY HEALTH OF SOUTH DADE, INC., a Florida Corporation,

Defendants.
_____/

ORDER ON PLAINTIFF'S MOTION TO STAY

THIS CAUSE having come before the Court on September 29, 1988, on Plaintiff's Motion for Stay Pending Review, and the Court having heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Plaintiff's

Motion shall be and the same is hereby granted. This action shall be abated and all discovery shall be stayed by all parties pending the review by the Third District Court of Appeal of this Court's Order dated September 19, 1988. Additionally, the Plaintiff must file a Petition for Writ of Certiorari with the Third District Court of Appeal within ten (10) days and must timely file all Motions in the Appellate Court. Failure to file a timely Motion in the Appellate Court will lift the stay imposed by this Order.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 17 day of October, 1988.

HERBERT M. KLEIN
CIRCUIT COURT JUDGE

Copies Furnished to:
See attached List

EXHIBIT "A"

FOR THE ELEVENTH CIRCUIT

No. 88-5309

DONALD PRUESSMAN,

Plaintiff-Appellant,

versus

GORDON LEWIS, et al

Defendants-Appellees

Appeal from the United States
District Court for the
Southern District of Florida

ON PETITION(S) FOR REHEARING

BEFORE: FAY, VANCE and KRAVITCH, Circuit Judges

PER CURIAM:

The petition(s) for rehearing filed by the appellant, is *Denied*.

ENTERED FOR THE COURT:

Robert S. Vance
United States Circuit Judge

UNITED STATES COURT OF APPEALS

For The Eleventh Circuit

No. 88-5309
Non-Argument Calendar

D.C. Docket No. 86-1140

DONALD PRUESSMAN,

Plaintiff-Appellant,

versus

GORDON LEWIS, et al.,

Defendants-Appellees.

- - - - - - - - - - - - - - - -

Appeal from the United States
District Court for the
Southern District of Florida

- - - - - - - - - - - - - - - -

Before FAY, VANCE and KRAVITCH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 34-3;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED. Entered: December 19, 1988
For the Court: Miguel J. Cortez, Clerk

By: *Karen McNabb*
Deputy Clerk

ISSUED AS MANDATE: FEB 02 1989

UNITED STATES CONSTITUTION

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free excercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probably cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand

Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any

law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983

Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of

this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 1343

Civil rights and elective franchise.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Supreme Court, U.S.
FILED
MAY 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1711

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

DONALD PRUESSMAN,

Petitioner,

v.

GORDON LEWIS, M.D.; DR. JOHN T. MacDONALD FOUNDATION, d/b/a DOCTORS HOSPITAL; JOSEPH F. McALOON, STUART L. SMITH; L.C. SMALL; CITY OF CORAL GABLES, KEN BUSH; R. POOR; D. MOORE; RICHARD J. NAUE, JR.; GLENN FALK; COMMUNITY HEALTH OF SOUTH DADE, INC.; JOHN H. TRENHOLM; JEROME BELOFF, M.D.; ANGEL DIAZ M.D.; MICHAEL ROBINSON,

Respondents.

GORDON LEWIS, M.D.'S RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

WENDY F. LUMISH
RUMBERGER, KIRK, CALDWELL,
CABANISS, BURKE & WECHSLER
Professional Association
One Biscayne Tower
Suite 3100
2 South Biscayne Boulevard
Miami, Florida 33131
(305) 358-5577

Attorneys for Respondent,
GORDON LEWIS, M.D.

---

26 pp

QUESTION PRESENTED

Whether the Eleventh Circuit Court of Appeals, in affirming the dismissal of this action by the United States District Court for the Southern District of Florida, decided a federal question so as to conflict with applicable decisions of this Court, or rendered a decision in conflict with a decision of another federal court, or decided an important issue not previously settled by this Court?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE AND FACTS . .	1
ARGUMENT	5
I. THERE IS NO BASIS FOR THE EXERCISE OF THIS COURT'S JURISDICTION.	5
A. The Eleventh Circuit's Opinion is Consistent with Applicable Supreme Court Decisions. . . .	6
B. The Eleventh Circuit's Decision is Consistent with Other Federal Decisions.	16
C. This Case Does Not Present an Important Issue of Unsettled Law.	20
CONCLUSION	22

TABLE OF AUTHORITIES

Page

CASES:

Brillhart v. Excess Insurance Co. of America, 316 U.S. 491, 62 S. Ct. 1173, 86 L. Ed. 2d 1620 (1942) 9-11

City Federal Sav. Bank v. Dominion Federal Sav. & Loan Ass'n, 657 F. Supp. 477 (S.D. Fla. 1987) 10

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) 4, 6-8, 10, 13-16, 18, 19

Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) . . 4, 6-8, 12, 15, 16, 18, 19

Glover v. City of Portland, Tennessee, 675 F. Supp. 398 (M.D. Tenn. 1987) 17

Gonzalez v. Gonzalez, 536 F.2d 453 (1st Cir. 1976) 20

Heritage Land Co. v. Federal Deposit Ins. Corp., 572 F. Supp. 1265 (W.D. Okla. 1983) 12

TABLE OF AUTHORITIES (cont'd)

Page

Kerotest Mfg Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 72 S. Ct. 219, 96 L. Ed. 200 (1952) 6

Lumen Constr. Inc. v. Brant Constr. Co., Inc., 780 F.2d 691 (7th Cir. 1985) 20

Mission Insurance Co. v. Puritan Fashion Corp., 706 F.2d 599 (5th Cir. 1983) 8

Roy v. Verchereau, 619 F. Supp. 1323 (D. Vt. 1985) . . 20

Sisler v. West, 570 F. Supp. 1 (S.D. Iowa), aff'd, 718 F.2d 107 (8th Cir. 1983) 16, 17

Will v. Calvert Fire Ins. Co., 437 U.S. 655, 98 S. Ct. 2552, 57 L. Ed. 2d 504 (1978) 7, 9

OTHER AUTHORITIES:

42 U.S.C. § 1983 . . . . . .1, 3, 8, 10, 12, 15-19

§ 394.463, Fla. Stat. 1

STATEMENT OF THE CASE AND FACTS

Petitioner's statement ignores certain facts which are significant to an understanding of the issues presented. As such, Respondent, GORDON LEWIS, presents the following statement of the case and facts.

On May 28, 1986, Plaintiff, DONALD PRUESSMAN, filed two pro se Complaints against the same defendants. One action was filed in state court (the Eleventh Judicial Circuit in and for Dade County) and the second was filed in federal court (the Southern District of Florida). Both Complaints arose out of an involuntary commitment procedure conducted by Defendants pursuant to section 394.463, Florida Statutes, Florida's Mental Health "Baker" Act. As amended, both complaints sought recovery under theories of false imprisonment, assault and battery, conspiracy and violations of 42 U.S.C. § 1983. The

federal court action also sought declaratory relief. The state court action was vigorously pursued, while Plaintiff failed to even effectuate service of process in the federal court proceeding.

On October 2, 1987, the district court sua sponte entered an Order to Show Cause why Plaintiff's case should not be dismissed for lack of prosecution. (R1-3).[1] Plaintiff responded and the Court quashed its order to show cause on November 24, 1987. (R2-19). Plaintiff was ordered to effectuate service upon all parties within forty-five (45) days of the Order. (R2-19). Finally, on January 20, 1988, LEWIS was served with the federal Amended Complaint (R1-8), nearly nine months after he was served with the state court Complaint.

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[1]All Record references in this Response are to the record before the Eleventh Circuit.

LEWIS filed a Motion to Dismiss on the basis that the same action was pending and actively being pursued in state court. On January 28, 1988, the district court entered an Order dismissing Plaintiff's state court claims since they "present[ed] matters purely of state law" and the court found that it would "be inappropriate and inefficient to litigate these matters in federal court." (R1-13-1).

On February 8, 1988, the district court entered an Order dismissing the § 1983 claim and prayer for declaratory relief finding that there was not a good faith basis for the simultaneous institution and continued maintenance of complaints by Plaintiff in two different courts. (R1-16-1). Plaintiff's Motion to Vacate was denied (R2-18) and Plaintiff timely appealed. (R2-21).

On December 19, 1988, the United States Court of Appeals for the Eleventh

Circuit affirmed the district court's dismissal of the action finding that an evaluation of the factors set forth in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) and Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983), established that dismissal was proper. Rehearing was denied on January 23, 1989. On April 21, 1989, Plaintiff filed the instant Petition for a Writ of Certiorari in the Supreme Court of the United States.

ARGUMENT

I.

THERE IS NO BASIS FOR THE EXERCISE OF THIS COURT'S JURISDICTION.

It is axiomatic that this Court will limit its adjudicatory resources to those cases involving the most fundamental constitutional and statutory questions and to preserve uniformity of decisions among the intermediate courts. Petitioner herein argues that certiorari should be granted because the Eleventh Circuit's decision conflicts with Supreme Court and other federal court decisions and raises an important issue not previously settled by this Court. This response will demonstrate that there is no basis upon which this Court should review the Eleventh Circuit's decision.

A. The Eleventh Circuit's Opinion is Consistent with Applicable Supreme Court Decisions.

The issue before the Eleventh Circuit Court of Appeals was whether the district court properly dismissed Plaintiff's federal action in deference to the identical action pending in state court. The appropriate test by which to determine if a federal court should dismiss an action based on a concurrent state action is set forth in Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976) and Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). In Colorado River, this Court recognized that there are principles of "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation,"424 U.S. at 817 (quoting Kerotest

Manufacturing Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180, 183, 72 S. Ct. 219, 221, 96 L. Ed. 200, 203 (1952)), which govern in situations involving the exercise of concurrent jurisdiction.

The factors to be considered in making this determination include the following: (1) whether one of the courts had assumed jurisdiction over the property; (2) the inconvenience of the federal forum; (3) the potential for piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal or state law will be applied; and (6) the adequacy of each forum to protect the party's rights. Colorado River, 424 U.S. at 818; Cone Memorial, 460 U.S. at 23-27.

Moreover, when called upon to review a district court's decision, the issue is whether the district court abused its discretion in dismissing the action. Will v.

Calvert Fire Ins. Co., 437 U.S. 655, 98 S. Ct. 2552, 57 L. Ed. 2d 504 (1978); Mission Insurance Co. v. Puritan Fashion Corp., 706 F.2d 599 (5th Cir. 1983).

Petitioner contends that the Eleventh Circuit's decision, which affirmed the district court's dismissal, does not comport with Cone Memorial and Colorado River. Of primary concern to Petitioner is the pendency of his § 1983 action. However, an analysis of the facts of this case, even taking into account the existence of a § 1983 action, reveals that the Eleventh Circuit's ruling is consistent with the Supreme Court's pronouncements.

The first two factors are neutral. This case does not involve a situation where a court has assumed jurisdiction over property. Thus, this factor is not relevant. As to the second factor, the inconvenience of the federal forum, LEWIS agrees

with Petitioner that either forum is convenient to all parties.

The third factor, the potential for piecemeal litigation overwhelmingly weighs in favor of dismissal of the federal action. The avoidance of piecemeal litigation was the message conveyed by the Supreme Court's decision in Brillhart v. Excess Insurance Co. of America, 316 U.S. 491, 62 S. Ct. 1173, 86 L. Ed. 2d 1620 (1942):

> Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided.

62 S. Ct. at 1175 (citations omitted).

Similarly, in Will v. Calvert Fire Insurance Co., 437 U.S. 655, 98 S. Ct. 2552, 57 L. Ed. 2d 504 (1978), Justice Rehnquist applied the reasoning of the

Brillhart decision to a case involving concurrent jurisdiction. Recognizing the dangers of duplicative and piecemeal litigation, Justice Rehnquist stated:

> The decision [whether to abstain] in such circumstances is largely committed to the discretion of the district court. Furthermore, Colorado River established that such deference may be equally appropriate even when matters of substantive federal law are involved in the case.

98 S. Ct. at 2558 (citations omitted).

Applying the foregoing to the present case, it is apparent that this factor weighs in favor of dismissal of the federal action. Petitioner's federal action seeks damages based on an alleged violation of § 1983 and prays for declaratory relief. The § 1983 claim is also present in the state court action. Thus, there is no reason for the district court to proceed with the § 1983 claim where "one umbrella is available that will keep everyone out of the rain." City

Fed. Sav. Bank v. Dominion Fed. Sav. & Loan Ass'n, 657 F. Supp. 477, 480 (S.D. Fla. 1987).

Moreover, as the Brillhart court explained, the presence of a declaratory judgment claim in federal court does not require the federal court to retain the action. Litigation of Plaintiff's declaratory judgment in federal court while the primary issues concerning state law are litigated in state court is precisely the type of piecemeal litigation to be avoided.

The fourth factor, the order in which the forums obtained jurisdiction, also weighs heavily in favor of dismissal. Although Petitioner states that "both state and federal Complaints were filed concurrently and the lack of progress in both forums is virtually identical," the record reveals that this is not factually correct. The state and federal Complaints

were filed contemporaneously; however, service was perfected in the state court action on LEWIS on April 10, 1987 (R1-11-2); whereas, service of process was not perfected on LEWIS in the federal action until nine months later. (R1-8). Furthermore, Petitioner's § 1983 claim was perfected in state court by service of Plaintiff's First Amended Complaint on September 14, 1987 which was before service was perfected in the federal action on January 20, 1988. See Heritage Land Co. v. Federal Deposit Ins. Corp., 572 F. Supp. 1265 (W.D. Okla. 1983) (holding that the federal court complaint should properly be dismissed since the state court obtained jurisdiction first by service on the defendant).

In addition, as stated in Cone Memorial, priority should not be measured exclusively by which complaint was filed

first, but rather in terms of how much progress has been made in the two actions. 460 U.S. at 21. There can be no doubt that the state court action has progressed much further than the federal court action. In the state court action, interrogatories and requests to produce were propounded and answered, depositions were set, and motions were noticed and heard or pending while the federal court action has been basically inactive.

Furthermore, as stated in Colorado River, "the apparent absence of any proceedings in the district court, other than the filing of the complaint, prior to the motion to dismiss" weighed heavily in favor of dismissal of the federal action. 424 U.S. at 820. Similarly in this case, the district court, as well as the Eleventh Circuit Court of Appeals, noted Plaintiff's "egregious failure to prosecute this

case." (R1-16-1). Thus, as in Colorado River, there can be no doubt that it would be highly inequitable to LEWIS to duplicate time and effort by keeping this action in federal court.

The fifth factor, whether federal or state law will be applied, again supports the dismissal of this action from federal court. Petitioner's Complaint concerns a violation of Florida's Mental Health Act which is a matter of state law, and can be more adequately decided in a state forum. In addition, prior to the district court's Order of Dismissal, the court dismissed several state court claims, holding that "it would be inappropriate and inefficient to litigate these matters in Federal Court." (R1-13-1). As to the remaining claims for declaratory relief and relief pursuant to § 1983, the state court can adequately address these issues.

The sixth factor, the adequacy of each forum to protect the parties' rights, would appear to be neutral. As discussed above, since the state court is fully capable of deciding a § 1983 claim, it is not required that the federal court hear Plaintiff's declaratory judgment under § 1983. Furthermore, although the federal forum would be able to protect the *rights of the parties, this matter involves a controlling question of state law and thus it would be more appropriate for the action to be tried in state court.

In sum, it is clear after balancing the factors set forth by Cone Memorial and Colorado River that the district court acted within its discretion in dismissing Plaintiff's action. As such, the Eleventh Circuit Court of Appeals decided the present federal question in a way consistent with applicable decisions of this Court. Both

the district court and the Eleventh Circuit Court of Appeals correctly applied the Colorado River/Cone Memorial test and therefore no basis for certiorari review exists.

B. The Eleventh Circuit's Decision is Consistent with Other Federal Decisions.

Consistent with the Supreme Court's rulings, a number of federal courts have found that dismissal of a federal action, in deference to a state court action was proper even where the federal action was based on a violation of § 1983. The Eleventh Circuit's ruling is in accord with these cases.

For example, in Sisler v. West, 570 F. Supp. 1 (S.D. Iowa), aff'd, 718 F.2d 107 (8th Cir. 1983), plaintiff filed a state action asserting only state theories of liability. Eighteen (18) months later, plaintiff filed a § 1983 action in federal court. Both actions contained identical issues of fact. Noting that substantial

discovery had taken place in the state court suit while very little progress had been made in the federal court suit, the court held that the exercise of concurrent jurisdiction would result in piecemeal litigation, waste of judicial resources and inconvenience to the parties. 570 F. Supp. at 3. Just as in Sisler, Plaintiff, for all practical purposes, commenced his federal court action a significant amount of time after the state court action. Furthermore, discovery and prosecution of the state court action which also includes a § 1983 claim, was progressing while the federal court action laid dormant.

Similarly, in Glover v. City of Portland, Tennessee, 675 F. Supp. 398 (M.D. Tenn. 1987), the plaintiff filed an action pursuant to 42 U.S.C. § 1983 against several defendants in state court. She later dismissed one defendant and reinstated her

claim against that defendant in federal court. The defendant in federal court moved to dismiss based on the Supreme Court's decision in Cone Memorial and Colorado River. In response, plaintiff argued that the two lawsuits did not involve the same parties and that the federal forum has an obligation to hear all claims arising under 42 U.S.C. § 1983. The court dismissed after analyzing each of the relevant factors. Focusing on the issue of piecemeal litigation, the court observed that:

> Dividing her section 1983 claims between two courts is a wasteful means of litigating the plaintiff's lawsuit . . . This is just the kind of inefficiency that the Colorado River doctrine was created to address.

Id. at 404-405. The court further rejected plaintiff's contention that the presence of a § 1983 action precludes dismissal since

plaintiff allegedly cannot obtain adequate relief in state court.

In DeVona v. City of Providence, 652 F. Supp. 683 (D.R.I. 1987), the plaintiff filed actions in state and federal court. Each was filed pursuant to 42 U.S.C. § 1983 alleging violations of plaintiff's constitutional rights. The defendants moved to dismiss plaintiff's federal complaint on the grounds "that the federal proceeding was duplicative. . . ." Id. at 685.

The court granted defendant's motion to dismiss after considering the Colorado River and Cone Memorial factors stating:

> This standard does not impose an unflagging obligation on the court to exercise jurisdiction which may be rebutted only by the presence of exceptional circumstances. Rather, the process is one of balancing the Moses H. Cone indicia (along with any other relevant factors) in order to determine whether or not the

> court should exercise its undoubted discretion.

652 F. Supp. at 686. The court also expressed concern about the waste of judicial resources involved in maintaining two suits and the burden on the effective administration of the court's business. The presence of a § 1983 action did not alter the court's conclusion. See also Lumen Constr. Inc. v. Brant Constr. Co., Inc., 780 F.2d 691 (7th Cir. 1985); Gonzalez v. Gonzalez, 536 F.2d 453 (1st Cir. 1976); Roy v. Verchereau, 619 F. Supp. 1323 (D. Vt. 1985). All of the foregoing decisions reveal that the Eleventh Circuit's ruling was proper and consistent with the law. As such, no basis for certiorari review exists.

C. This Case Does Not Present an Important Issue of Unsettled Law.

Defendant, LEWIS, recognizes the importance of the issue before this Court.

However, as the abundant body of law cited above demonstrates, the issue is well settled. Certiorari review would therefore be inappropriate.

(3)

No. 88-1711

Supreme Court, U.S.
FILED
MAY 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

DONALD PRUESSMAN,

Petitioner,

vs.

GORDON LEWIS, M.D.; DR. JOHN T. MacDONALD FOUNDATION d/b/a DOCTORS HOSPITAL; JOSEPH F. McALOON; STUART L. SMITH; L.C. SMALL; CITY OF CORAL GABLES; KEN BUSH; R. POOR; D. MOORE; RICHARD J. NAUE, JR.; GLENN FALK; COMMUNITY HEALTH OF SOUTH DADE, INC.; JOHN H. TRENHOLM; JEROME BELOFF, M.D.; ANGEL DIAZ, M.D.; MICHAEL ROBINSON,

Respondents.

On Petition For A Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI BY RESPONDENTS, CITY OF CORAL GABLES; KEN BUSH; R. POOR; D. MOORE; AND RICHARD J. NAUE, JR.

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RESTATED QUESTION PRESENTED FOR REVIEW

Whether the lower courts correctly utilized discretionary functions and *"wise judicial administration"*, by dismissing an egregiously neglected Federal claim in deference to an actively prosecuted concurrent State Court claim containing identical operative facts and seeking substantially similar recovery.

TABLE OF CONTENTS

Page

RESTATED QUESTION PRESENTED FOR REVIEW... i

TABLE OF AUTHORITIES iii

OPINIONS AND JUDGMENTS DELIVERED IN COURTS BELOW 2

SUPPLEMENTAL STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 8

ARGUMENT IN SUPPORT OF DENYING THE WRIT OF CERTIORARI 8

CONCLUSION 17

INDEX TO APPENDIX A-1

APPENDIX ..... A-2 – A-10

TABLE OF AUTHORITIES

Page

CASES:

Amen v. City of Dearborn, 532 F.2d 554 (6th Cir. 1976) 16

Amy v. City of Watertown, 130 U.S. 301 (1889) 15

Angora Enterprises, Inc. v. Condominium Association of Lakeside Village, 796 F.2d 384 (11th Cir. 1986) 13

Brillhart v. Excess Insurance Company of America, 316 U.S. 491 (1942) 13

Camps v. C & P Telephone Co., 692 F.2d 120 (D.C. Cir. 1981) 17

Carter v. City of Emporia, 815 F.2d 617 (10th Cir. 1987) 10

City Federal Savings & Loan Association v. Dominion Federal Savings & Loan Association, 657 F. Supp. 477 (S.D. Fla. 1987) 13

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) 11

Garcia v. Wilson, 731 F.2d 640 (10th Cir. 1984) 10

Goforth v. Owens, 766 F.2d 1533 (11th Cir. 1985) 16

Jackson v. Hayakawa, 682 F.2d 1344 (9th Cir. 1982) 16

Jones v. Graham, 709 F.2d 1457 (11th Cir. 1983) 16

Kerotest Manufacturing Co. v. C-O-Two Equipment Co., 342 U.S. 180 (1952) 11

Link v. Wabash Railroad, 370 U.S. 626 (1962) 16

Mission Insurance Co. v. Puritan Fashions Corp., 706 F.2d 599 (5th Cir. 1983) 13

TABLE OF AUTHORITIES – Continued

Page

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983) 11

North Allegheny Joint School System v. Secretary of Health, Education & Welfare, 196 F. Supp. 114 (W.D. Pa. 1961) 15

Pierson v. Ray, 386 U.S. 547 (1967) 9

Public Service Commission v. Wycoff Co., 344 U.S. 237 (1952) 13

Scheuer v. Rhodes, 416 U.S. 232 (1974) 9

Signad, Inc. v. City of Sugar Land, 753 F.2d 1338 (5th Cir. 1985) 12

Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950) 13

Tanner v. Hardy, 764 F.2d 1024 (4th Cir. 1985) 10

Tovar v. Billmeyer, 609 F.2d 1291 (9th Cir. 1980) 12

Watertown Equipment Co. v. Norwest Bank Watertown, N.A., 830 F.2d 1487 (8th Cir. 1987) 10

Wentz v. Klecker, 721 F.2d 244 (8th Cir. 1983) 10

Wood v. Strickland, 420 U.S. 308 (1975) 9

FEDERAL STATUTES AND RULES:

42 U.S.C. § 1983 8

Fed. R. Civ. P. 4(c)(2)(C)(ii) 14, 15

Fed. R. Civ. P. 4(d)(6) 14

Fed. R. Civ. P. 4(j) 5, 14

Fed. R. Civ. P. 41(b) 16

TABLE OF AUTHORITIES – Continued

Page

46 F.R.D. 101 14

Fed. Proc. Rules Service, District Court for the Southern District of Florida, Rule 13 6

FLORIDA STATUTES:

Fla. Stat. § 48.111 (1973) 15

Fla. Stat. § 394.463(1)(b)(3)(1981) 3

No. 88-1711

In The

Supreme Court of the United States

October Term, 1988

DONALD PRUESSMAN,

Petitioner,

vs.

GORDON LEWIS, M.D.; DR. JOHN T. MacDONALD FOUNDATION d/b/a DOCTORS HOSPITAL; JOSEPH F. McALOON; STUART L. SMITH; L.C. SMALL; CITY OF CORAL GABLES; KEN BUSH; R. POOR; D. MOORE; RICHARD J. NAUE, JR.; GLENN FALK; COMMUNITY HEALTH OF SOUTH DADE, INC.; JOHN H. TRENHOLM; JEROME BELOFF, M.D.; ANGEL DIAZ, M.D.; MICHAEL ROBINSON,

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On Petition For A Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI BY RESPONDENTS, CITY OF CORAL GABLES; KEN BUSH; R. POOR; D. MOORE; AND RICHARD J. NAUE, JR.

Your Respondents, CITY OF CORAL GABLES, (hereafter "CITY"), KEN BUSH, R. POOR, D. MOORE, and RICHARD J. NAUE, JR. (hereafter "OFFICERS"),

respectfully request that this Honorable Court deny the Petition for a Writ of Certiorari which seeks review of the *per curiam* decision of the Eleventh Circuit Court of Appeals in affirming the District Court's dismissal of a Federal lawsuit, as said litigation was egregiously neglected and claimant (hereinafter "PRUESSMAN") actively elected to advance his concurrent state cause of action that was based upon identical operative facts, involves identical parties, and seeks substantially similar recovery.

OPINIONS AND JUDGMENTS DELIVERED IN COURTS BELOW

The opinion of the United States Court of Appeals Eleventh Circuit Denying Appellant, PRUESSMAN'S, Petition for Rehearing appears at Appendix, page A-2.

The opinion of the United States Court of Appeals Eleventh Circuit on Appeal from United States District Court, Southern District of Florida appears at Appendix, page A-3.

The Order Denying Motion to Vacate Order of Dismissal of United States District Court, Southern District of Florida appears at Appendix, page A-6.

The Order of Dismissal of the United States District Court, Southern District of Florida appears at Appendix, page A-7.

The opinion of the United States Court of Appeals, Eleventh District, Affirming the Dismissal of the District Court is a non-published decision reported at 865 F.2d 1272.

SUPPLEMENTAL STATEMENT OF THE CASE

Respondents, CITY and OFFICERS, set forth the following additional facts and relevant matters.

On May 28, 1982, the CITY responded to a call from medical personnel at DOCTORS HOSPITAL concerning PRUESSMAN who refused to leave the hospital even though he was medically discharged. During his admission, PRUESSMAN exhibited aberrant behavior and threatened nurses and other patients. Pursuant to applicable Florida Statute[1] a psychiatric examination of PRUESSMAN was conducted by DR. GORDON LEWIS, and a certified report was executed confirming that

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[1] FLA. STAT. § 394.463(1)(b)(3) (1982). Emergency admission. – (a) Criteria – A person may be admitted to a receiving facility on emergency conditions if there is reason to believe that he is mentally ill and because of his illness is:

1. Likely to injure himself or others if allowed to remain at liberty;

(b) Initiation of proceeding – An emergency admission may be initiated as follows: (3) A mental health professional may execute a certificate that he has examined a person within the preceding 48 hours and finds that the person appears to meet the criteria for emergency admission, stating the observations upon which that conclusion is based. The mental health professional's certificate shall authorize a law enforcement officer to take the person into custody and deliver him to the nearest available receiving facility for emergency examination and treatment. The law enforcement officer shall execute a written report detailing the circumstances under which the person was taken into custody. The report and mental health professional's certificate shall be made a part of the patient's clinical record.

PRUESSMAN was mentally ill and was likely to injure himself or others unless immediately detained.[2]

The "Report of Law Enforcement Officer" portion of the certificate, confirming PRUESSMAN'S mental incapacity and dangerous propensity was completed. These findings reiterated support for the position that PRUESSMAN was a proper candidate for transfer to an appropriate facility for emergency admission.

Upon advise of GLENN FALK, counsel for CITY and OFFICERS, and based upon the executed certificate of mental health professional thereby vesting authority in the law enforcement personnel pursuant to the aforestated statute, OFFICERS transported PRUESSMAN by ambulance to the receiving facility at COMMUNITY HEALTH OF SOUTH DADE, INC.

In addition to the certificate prepared by DR. LEWIS corroborating PRUESSMAN'S mental illness, the medical records available at DOCTORS HOSPITAL confirm PRUESSMAN'S threatening, bizarre, and dangerous behavior. These records and a myriad of other documentation reveal that PRUESSMAN has suffered from chronic and permanent psychiatric illness for a period of at least ten (10) years preceding the subject incident.

PRUESSMAN claims that during the four (4) years following this incident he was unable to initiate litigation and advance his claim because of ". . . illness and difficulties in obtaining affordable counsel . . .".[3] This

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[2] *See* Appendix, page A-9.

[3] *See* PRUESSMAN'S Writ of Certiorari at page 10.

representation is totally misleading, for in truth PRUESSMAN persistently brought proceedings and initiated inquiries concerning exactly the same operative facts before no less than six (6) official agencies and officers.[4] On each occasion PRUESSMAN'S allegations were thoroughly investigated and summarily dismissed.

Nevertheless, on May 28, 1986, four years following the subject incident and on the very day when the Statute of Limitations was to run, PRUESSMAN filed lawsuits in the State and Federal Court forums. These lawsuits alleged identical operative facts, parties, and damages.

Subsequent to the simultaneous filing of the State and Federal lawsuits, PRUESSMAN totally neglected the Federal claim for a time period in excess of nineteen (19) months. During this time, however, PRUESSMAN deliberately chose to pursue, in an active fashion, his State Court lawsuit. Noting that there was an absence of activity in the Federal lawsuit[5] and PRUESSMAN'S failure to

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[4] Those Agencies / Officers and related information is as follows: 1.) Health and Rehabilitative Services – June through September, 1984, (resolved); 2.) State Attorney's Office – June through August, 1984, (dismissed); 3.) Dade Monroe Mental Health Board – June 28, 1983, (resolved); 4.) Human Rights Advocacy Committee – October through November, 1983 – January 1985, (resolved); 5.) Coral Gables Chief of Police – December 1983, (resolved); 6.) Florida Governor Bob Graham's Office – June through August, 1984, (resolved).

[5] *See* FED. R. CIV. P. 4.(j) "Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion . . . "

effect service of process[6] the District Court, on October 2, 1987, entered a *sua sponte* Order to show cause why PRUESSMAN'S Federal claim should not be dismissed.

On November 24, 1987, the District Court Judge quashed the Order to Show Cause; however, he specifically ruled that PRUESSMAN was to effect service upon all Defendants within forty-five (45) days or proceed *in forma pauperis*, and further that the prosecution of the case was to be advanced "EXPEDITIOUSLY".[7]

PRUESSMAN has alleged in his petition that "service was effected on all parties".[8] Again, PRUESSMAN has made significant misstatements of fact. The record is clear that PRUESSMAN flouted the District Court's Order by failing to effect service of process on the CITY, and by failing to serve no less than nine (9) of the other named Defendants.

On January 25, 1988, CITY and OFFICERS filed a Motion to Dismiss and/or Abate/Stay the Federal claim and raised the aforedescribed defenses as justification for

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[6] *See* Fed. Proc. Rules Service, Southern District Florida, Rule 13, "Dismissal for Want of Prosecution. Civil actions not at issue which have been pending without any proceedings having been taken therein for more than three months may be dismissed for want of prosecution by the Court on its own motion after notice to counsel of record. Such actions may also be dismissed for want of prosecution at any time on motion by any party upon notice to the other parties."

[7] Order appears at Appendix, page A-21 of PRUESSMAN'S Petition for Writ of Certiorari.

[8] *See* PRUESSMAN'S Writ of Certiorari at pages 13, 15, 19, & 21.

the dismissal. Additional reasons supporting a dismissal of PRUESSMAN'S Federal claim were raised by other party Defendants, and on February 8, 1988, the District Court entered an Order Dismissing the Federal forum lawsuit.[9]

In dismissing the Federal Complaint, the District Judge specifically noted that he considered a "careful review of the record" and that "particularly in light of the Plaintiff's egregious failure to prosecute this case, the Court will treat the Plaintiff as having elected to pursue his remedies in State Court."[10]

In response to PRUESSMAN'S Motion to Vacate Order of Dismissal, CITY and OFFICERS filed an appropriate Responsive Brief and Memorandum of Law. Subsequently, the District Court denied the Motion to Vacate Order of Dismissal and PRUESSMAN sought an appeal before the Eleventh Circuit. In response to this appeal to the Eleventh Circuit, CITY and OFFICERS filed an Answer Brief on July 8, 1988.

The Eleventh Circuit Court of Appeal affirmed (*per curiam*) the District Court's dismissal after "having given particular weight to the progress of the litigation in state court and the exceptional circumstances constituting PRUESSMAN'S 'egregious failure to prosecute the case' ".[11] It is upon the outcome of the appeal to the

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[9] District Court's Order of Dismissal appears at Appendix, page A-7.

[10] *Id.*

[11] Opinion of United States Court of Appeals affirming District Court's dismissal appears at Appendix, page A-3.

Eleventh Circuit that PRUESSMAN has sought a Writ of Certiorari before this Court.

SUMMARY OF ARGUMENT

1). There is no basis for granting the Writ of Certiorari since the lower court correctly employed 'wise judicial administration' by dismissing the Federal claim in deference to the parallel State Court action.

2). The action of the lower court does not warrant the granting of a Writ of Certiorari by this Court. The dismissal of the Federal claim was an action well within the inherent power of the District Court Judge and was based upon PRUESSMAN'S clear and consistently egregious failure to prosecute his Federal lawsuit.

ARGUMENT IN SUPPORT OF DENYING THE WRIT OF CERTIORARI

A). IN THE INTEREST OF FEDERAL-STATE COMITY AND IN DEFERENCE TO AN ADVANCED PARALLEL STATE COURT ACTION THE DISMISSAL OF PRUESSMAN'S COMPLAINT CONSTITUTES THE USE OF 'WISE JUDICIAL ADMINISTRATION'.

Section 1983[12] actions were created to provide redress for civil rights violations in the wake of the Civil Rights Act of 1871. There existed a need for a vindication of rights jeopardized initially by certain social elements existing principally in Southern states in the post Civil

[12] Title 42 USC § 1983.

War era. Civil enforcement to protect these rights was the remedy envisioned by Congress. Indeed, where there has been injury or damage committed under color of State law to a person or his constitutional rights then civil remedies are in order.

However, these actions are not to be considered an unbridled right to engage warrantless litigation against parties who are entitled to immunity in the performance of their civic responsibilities. Courts throughout our land have steadfastly held that local police officers and agencies enjoy a "good faith and probable cause" defense to § 1983 claims.[13] This doctrine of official immunity for the police officer is based upon concern that a threat of personal liability would adversely affect the officer's decision making process, and would deter his willingness to execute his duties with the decisiveness, judgment, and interest in protecting the public good.[14]

The OFFICERS who took PRUESSMAN into custody for transfer to an appropriate facility obviously conducted themselves in good faith, and without question were operating under probable cause. Pursuant to applicable Florida Statute[15] the OFFICERS noted that a qualified expert, DR. LEWIS, acknowledged PRUESSMAN'S

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[13] Pierson v. Ray, 386 U.S. 547 (1967).

[14] Scheuer v. Rhodes, 416 U.S. 232 (1974). *See also*, Wood v. Strickland, 420 U.S. 308 (1975), (which identifies an additional justification for extending qualified immunities to public officials: the fear of personal liability may deter individuals from holding official positions).

[15] *Id*, at note 1 (also referred to as the "Baker Act").

mental illness.[16] This medical expert completed the report certifying that PRUESSMAN fit the profile contemplated for commitment under the "Baker Act".

The 'Report of Law Enforcement Officer' aspect of the certificate was properly completed contrary to PRUESSMAN'S assertions.[17] In addition to these personal observations and the instructions from DR. LEWIS, the OFFICERS' good faith is further bolstered because they did not commence the transfer of PRUESSMAN until they had received and relied upon advise from their legal counsel, GLENN FALK.[18]

It has been recognized that both State and Federal Courts have jurisdiction to resolve grievances concerning § 1983 claims.[19] The issue before this Court is whether the lower courts properly exercised discretion in dismissing

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[16] *See* Appendix at page A-9. (Physicians certificate confirms "[i]n my opinion this person (PRUESSMAN) appears to be mentally ill and is likely to physically injure himself or others unless immediately detained . . . ").

[17] *Id.*

[18] Although the facts at issue reveal an absolute showing of the OFFICER'S good faith in the performance of their duties based upon their reliance of Florida Statutes, the certificate of the mental health expert, and their own observations, there is additional indicia of good faith shown upon this reliance of advise from counsel. *See* Wentz v. Klecker, 721 F.2d 244 (8th Cir. 1983); Tanner v. Hardy, 764 F.2d 1024 (4th Cir. 1985); Watertown Equipment Company v. Norwest Bank Watertown, N.A., 830 F.2d 1487 (8th Cir. 1987).

[19] Garcia v. Wilson, 731 F.2d 640 (10th Cir. 1984), *aff'd*, 471 U.S. 261 (1985); Carter v. City of Emporia, 815 F.2d 617 (10th Cir. 1987).

the Federal claim and yielding jurisdiction to the parallel State Court. There are several principal reasons in support of the District Court's dismissal of PRUESSMAN'S Complaint. One such reason in support of the dismissal concerns the principles of comity given to the State Court forum. Another reason, closely related is PRUESSMAN'S obvious failure to adhere to the rules and dictates of the Federal forum.

Focusing on the dismissal based upon principles of comity it is to be noted that there are valid circumstances that allow a Federal § 1983 claim to be dismissed in deference to a parallel State action. The litmus test in justifying a dismissal of a Federal § 1983 claim in favor of a State Court forum has been identified as the use of " '[w]ise judicial administration' ".[20]

The Court in *Colorado River* initially defined 'wise judicial administration' by enumerating several elements used to justify a dismissal of a Federal claim in deference to a State claim.[21] These suggested criteria were further expanded by the Court when there exists an "absence of any substantial progress in the Federal Court litigation".[22]

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[20] Colorado River Water Conservation District v. United States, 424 U.S. 800, 817 (1976) *quoting* Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180, 183 (1952).

[21] These factors include 1) whether one court has assumed jurisdiction over the subject property; 2) the inconvenience of the Federal forum; 3) the potential for piecemeal litigation; and 4) the order in which jurisdiction was obtained by the forums.

[22] Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 16 (1983).

The fact that PRUESSMAN'S Federal claim lay completely dormant for nineteen (19) months while he actively pursued his concurrent State Court remedies warrants dismissal of the Federal claim in the exercise of wise judicial administration. The record clearly reveals that only after the threat of a *sua sponte* Order to show cause why the lawsuit should not be dismissed did PRUESSMAN attempt to serve any of the party Defendants; and, to this date, almost three years after the filing of the Federal forum action, PRUESSMAN has failed to accomplish this requisite task.

A further element in the test to determine the priority of judicial forums involves inquiry into whether concurrent proceedings produce piecemeal litigation. It is recognized that "piecemeal litigation and some duplication of judicial effort is the unavoidable price of preserving access to the Federal relief which section 1983 assures."[23] Nevertheless, when 1) both actions are parallel, 2) the State forum is fully capable of adjudicating all rights of the parties, and 3) the State forum is significantly more advanced than the Federal forum, reason dictates that wise judicial administration would be best served by dismissing the duplicitous Federal forum claim.

PRUESSMAN has raised concern about a resolution of his declaratory judgment claim. The filing of a declaratory judgment action, as sought by PRUESSMAN, does not automatically confer jurisdiction. To the contrary,

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[23] Signad, Inc. v. City of Sugar Land, 753 F.2d 1338, 1340 (5th Cir. 1985), *citing* Tovar v. Billmeyer, 609 F.2d 1291, 1293 (9th Cir. 1980).

relief is a remedy which is left to the sound discretion of the District Court.[24]

When a proceeding is pending in a State Court where all the matters in controversy between the parties can be fully adjudicated a declaratory judgment action in Federal Court is an "interference with the orderly and comprehensive disposition of a State Court litigation" which should be avoided.[25] In fact, this Court has aptly recognized that "it would be uneconomical as well as vexatious for a Federal Court to proceed in a declaratory judgment suit where another suit is pending in a State Court presenting the same issues, not governed by Federal law, between the same parties."[26] Accordingly, there is no issue upon which this Court should grant PRUESSMAN'S Writ.

B). PRUESSMAN'S EGREGIOUS FAILURE TO PROSECUTE THE FEDERAL CLAIM CONSTITUTES JUSTIFICATION FOR DISMISSAL.

After having egregiously neglected the Federal claim for over nineteen (19) months in derogation of Federal

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[24] *See*, Public Service Commission v. Wycoff Co., 344 U.S. 237 (1952); Skelly Oil Co., v. Phillips Petroleum Co., 339 U.S. 667 (1950); Mission Insurance Co. v. Puritan Fashions Corp., 706 F.2d 599 (5th Cir. 1983).

[25] Brillhart v. Excess Insurance Co. of America, 316 U.S. 491, at 495 (1942); *compare*, City Federal Savings & Loan Association v. Dominion Federal Savings & Loan Association, 657 F. Supp. 477 (S.D. Fla 1987).

[26] *Id*, at 495. *Accord*, Angora Enterprises, Inc. vs. Condominium Association of Lakeside Village, 796 F.2d 384 (11 Cir. 1986).

Procedure,[27] the District Court allowed PRUESSMAN one final opportunity to show good faith and cure his recalcitrance. The District Judge directed PRUESSMAN to effect service of process on all Defendants within forty-five (45) days and specifically instructed him to proceed with the case "EXPEDITIOUSLY".

PRUESSMAN has consistently alleged in his Writ that he has complied with the District Court's Order to effect service upon all Defendants within the forty-five (45) day time period.[28] However, these statements are totally inaccurate. PRUESSMAN admits that he attempted service on the CITY by employing Federal Rule of Civil Procedure 4(c)(2)(C)(ii). The use of this method of service upon a municipality, however, is improper and invalid since the correct rule requires personal service upon the chief executive officer.[29]

The word "delivery" in Rule 4.(d)(6) has been construed to mean personal service.[30] In fact, this Court has

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[27] *See* FED R. CIV. P. 4.(j) *supra* at note 5.

[28] PRUESSMAN'S Writ of Certiorari at page 13 " . . . pursuant to Rule 4(c)(2)(C)(ii), service was effected on all defendants . . . ". *See also supra* at note 9.

[29] FED. R. CIV. P. 4.(d)(6) states that service *shall* be made as follows: "[u]pon a state or municipal corporation or other governmental organization thereof subject to suit, by delivering a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant" (emphasis added).

[30] 46 F.R.D. 101, 114.

confirmed that "where a particular method of serving process is pointed out by statute that method *must* be followed" (emphasis added).[31] The method of service used by PRUESSMAN was certified mail, which has been held to be inadequate when personal service is warranted.[32] Accordingly, PRUESSMAN failed to follow procedures for effecting service upon the CITY as outlined by Federal and State law.[33]

PRUESSMAN has further acknowledged that he attempted service upon the OFFICERS by utilizing those methods identified in Federal Rule 4.(c)(2)(C)(ii). However, as reflected on PRUESSMAN'S "Schedule of Service"[34] the acknowledgment forms were not returned on at least eleven (11) Defendants. Applicable rules provide that "[i]f no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint *shall* be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3)" (emphasis added).[35] Not only does PRUESSMAN'S egregious neglect of the Federal claim and his failure to comply with the District Court's Order

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[31] Amy v. City of Watertown, 130 U.S. 301 (1889).

[32] North Allegheny Joint School System v. Secretary of Health, Education & Welfare, 196 F. Supp. 114 (W.D. Pa. 1961).

[33] The prescribed manner of service upon a municipality in Florida is defined in FLA. STAT. § 48.111, which appears at Appendix, page A-10.

[34] *See* PRUESSMAN'S Writ of Certiorari at Appendix, page A-38-39.

[35] FED. R. CIV. P. 4.(c)(2)(C)(ii).

to effect proper service and prosecute the case "EXPEDITIOUSLY" warrant dismissal, but the obvious consequence of the failure to effect service within the rules of procedure constitutes a lack of personal jurisdiction over the Defendants.[36]

PRUESSMAN admits that the deliberate failure to prosecute this Federal claim reflects egregious behavior.[37] When there exists a failure to prosecute a claim, a Federal District Judge may impose sanctions including a dismissal of the lawsuit.[38]

The rulings of this Court confirm that the District Court is couched with an "inherent power" to dismiss a cause of action for a Plaintiff's failure to prosecute a claim.[39] This sanction is recognized as necessary "in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts."[40] The District Court did not abuse its discretion by dismissing the Federal claim and there is no cause to review this dismissal since the facts at issue present a "clear record of delay."[41]

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[36] *Compare* Jackson v. Hayakawa, 682 F.2d 1344 (9th Cir. 1982); Amen v. City of Dearborn, 532 F.2d 554 (6th Cir. 1976).

[37] PRUESSMAN'S Petition for Writ of Certiorari at page 38 "[a]dmittedly, there has been egregiousness associated with this case".

[38] FED. R. CIV. P. 41.(b), provides that involuntary dismissal is proper "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court . . . ".

[39] Link v. Wabash Railroad Co., 370 U.S. 626, 737 (1962).

[40] *Id.* at 629.

[41] Dismissal is appropriate where there is a clear record of delay. Goforth v. Owens, 766 F.2d 1533, 1535 (11th Cir. 1985), *quoting* Jones v. Graham, 709 F.2d 1457, 1458 (11th Cir. 1983).

PRUESSMAN, nevertheless, claims to "seek no special favors"[42] and states that a deprivation of his civil rights will occur as a result of the dismissal of his Federal lawsuit The lower courts have shown this self proclaimed "judicial indigent"[43] extensive latitude which he has deliberately flaunted. He intentionally discharged his legal counsel and has voluntarily sought to proceed with his claims *pro se*[44]. Indeed, PRUESSMAN will not be deprived of an opportunity to air his grievance since the State forum is fully capable of determining the rights of all parties to this lawsuit. The lower court's dismissal of the Federal claim was proper especially given PRUESSMAN'S progress in the State Court proceeding and the exceptional circumstances constituting the egregious failure to prosecute the Federal litigation.

CONCLUSION

The Writ for review by this Court should not be granted since the lower courts correctly employed wise judicial administration in dismissing the egregiously malprosecuted and dormant Federal claim in deference to the advanced parallel State Court action. Moreover, the State

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[42] PRUESSMAN'S Writ of Certiorari at page 42.

[43] *Id.* at page 44.

[44] The *pro se* status of PRUESSMAN should not cause him to fare better than a party serviced by counsel. "The critical factor in each instance (to warrant dismissal) should be the seriousness of the misbehavior, and not the presence or absence of a legal representative" (explanation added). Camps v. C & P Telephone Co., 692 F.2d 120, 124 (D.C. Cir. 1981).

forum lawsuit is fully capable of serving as a vehicle for the complete and prompt resolution of all issues concerning this matter.

Respectfully submitted,

DENNIS O. SHILLEN
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INDEX TO APPENDIX

Order on Appellant's Petition for Rehearing..... A-2

Opinion of U.S. Court of Appeals, Eleventh Circuit on Appeal from U.S. District Court for Southern District of Florida..... A-3

Order Denying Motion to Vacate Order of Dismissal..... A-6

Order of Dismissal A-7

Emergency Admission Physicians Certificate and Report of Law Enforcement Officer..... A-9

Florida Statute § 48.111..... A-10

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-5309

DONALD PRUESSMAN,

Plaintiff-Appellant,

versus

GORDON LEWIS, et al.,

Defendants-Appellees.

Appeal from the United State District Court for the Southern District of Florida

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(Filed Jan. 23, 1989)

ON PETITION(S) FOR REHEARING

BEFORE: FAY, VANCE and KRAVITCH, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by the appellant, is Denied.

ENTERED FOR THE COURT:

/s/ Robert S. Vance
United States Circuit Judge

ORD-41

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-5309
Non-Argument Calendar

D. C. Docket No. 86-1140

DONALD PRUESSMAN,

Plaintiff-Appellant,

versus

GORDON LEWIS, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(December 19, 1988)

Before FAY, VANCE and KRAVITCH, Circuit Judges.

PER CURIAM:

Donald Pruessman filed this civil rights action in district court on May 28, 1986 alleging that his confinement in the Community Health Center of South Dade deprived him of his liberty without due process of law. In his amended complaint he stated claims under 42 U.S.C. § 1983 and state law. On the same day he filed in state court a second suit arising out of the same incident. The state proceeding also seeks relief under both state law and 42 U.S.C. § 1983.

For nearly a year and a half nothing happened: the defendants were not served, and this case lay dormant. Finally, the district court issued a sua sponte order directing that Pruessman show cause why the case should not be dismissed for lack of prosecution. Pruessman responded that he had suffered health problems and had a dispute with his attorney. On November 24, 1987 the district court quashed the show cause order but ordered plaintiff to effect service on all parties. During January 1988 he effected service on some but not all defendants. Nothing further of significance has taken place in connection with his prosecution of the case.

Defendants moved to dismiss, disclosing to the district court the pendency of the state court action. Defendants also represented that service of process had been perfected in the state action in April 1987 and that discovery had taken place and was continuing in the state action.

On February 8, 1988 the district court dismissed the case holding that plaintiff elected to pursue the state action "particularly in light of the plaintiff's egregious failure to prosecute this case."

To the extent that the district court's order indicates that a proceeding in state court is invariably a bar to proceedings concerning the same matter in federal court, it is in error. *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 23-26 (1983); *Noonan South, Inc. v. County of Volusia*, 841 F.2d 380 (11th Cir. 1988). Notwithstanding the district court's questionable statement of the law, our evaluation of the

factors listed in *Colorado River* and *Moses H. Cone* establish that its order of dismissal does not require reversal. *See Collins v. Seaboard*, 681 F.2d 1333, 1335 (11th Cir. 1982). In reaching this determination we have given particular weight to the progress of the litigation in state court and the exceptional circumstances constituting Pruessman's "egregious failure to prosecute this case."

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-1140-CIV-SPELLMAN

DONALD PRUESSMAN,

Plaintiff,

-vs-

GORDON LEWIS, et al.,

Defendants.

(Filed Mar. 23, 1988)

ORDER DENYING MOTION TO VACATE ORDER OF DISMISSAL

THIS CAUSE comes before the Court upon Plaintiff's Motion to Vacate Order of Dismissal. Upon careful review of the record, it is hereby

ORDERED AND ADJUDGED that this Motion is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida this 23 day of March, 1988.

/s/ Eugene Spellman
UNITED STATES
DISTRICT JUDGE

cc: all counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-1140-CIV-SPELLMAN

DONALD PRUESSMAN,

Plaintiff,

-vs-

GORDON LEWIS, et al.,

Defendant.

(Filed Feb. 8, 1988)

ORDER OF DISMISSAL

THIS CAUSE comes before the Court upon Defendants' Motion to Dismiss, Quash and/or Abate/Stay Plaintiff's Complaint. Upon careful review of the record, it appears that on the same day that the Plaintiff filed the instant Action, he filed a complaint arising out of the same events and seeking substantially identical relief in state court. This was clearly not within the contemplation of Congress when it created concurrent jurisdiction for civil rights actions in 42 U.S.C. section 1343. A civil rights litigant may choose *between* a federal and state form; he may not, however, maintain two such actions concurrently. The Court finds no good faith basis for the simultaneous institution and the continued maintenance of these complaints by the Plaintiff in two different courts. *See* FED. R. CIV. P. 11. The Court notes that this is not the situation in which two different parties institute lawsuits in different courts to adjudicate claims arising out of the same transaction or incident. Moreover, particularly in light of the Plaintiff's egregious failure to prosecute this case, the Court will treat the Plaintiff as having elected to

pursue his remedies in state court. Accordingly, it is hereby

ORDERED AND ADJUDGED that the Defendants' Motion to Dismiss is GRANTED, and this case is dismissed.

DONE AND ORDERED in Chambers at Miami, Florida this 8 day of February, 1988.

/s/ Eugene Spellman
UNITED STATES
DISTRICT JUDGE

cc: all counsel of record

OVERSIZE FOLDOUT(S) FOUND HERE IN THE PRINTED EDITION OF THIS VOLUME ARE FOUND FOLLOWING THE LAST PAGE OF TEXT IN THIS MICROFICHE EDITION.

SEE FOLDOUT NO 1

48.111 Service on public agencies and officers

(1) Process against any municipal corporation, agency, board or commission, department or subdivision of the state or any county which has a governing board, council or commission or which is a body corporate shall be served:

(A) On the president, mayor, chairman or other head thereof; and in his absence;

(b) On the vice-president, vice-mayor or vice-chairman, or in the absence of all of the above;

(c) On any member of the governing board, council or commission.

(2) Process against any public agency, board, commission or department not a body corporate or having a governing board or commission shall be served on the public officer being sued or the chief executive officer of the agency, board, commission or department.

(3) As an alternative to all of the foregoing process may be served on the person designated pursuant to § 120.071.

EMERGENCY ADMISSION

PHYSICIAN'S CERTIFICATE AND REPORT OF LAW ENFORCEMENT OFFICER

STATE OF FLORIDA, COUNTY OF Dade, FLORIDA

C.H.I. 10300 SW 216ST. Miami, Fla
(Receiving Facility and Address)

and to Officer J. Wilcox (0160)
(Law Enforcement Officer)

This is to certify that I have examined Donald Pinnisman on May 28, 1982, which was within the proceding 48 hours of the date of this certificate. In my opinion this person appears to be mentally ill and is likely to physically injure himself or others unless immediately detained. My observation upon which this conclusion is based are: Threatening violent tendencies & written note to murder; Unpredictable outbursts of anger; paranoid delusions; Refuses appropriate medication Refused To leave Hosp. Through dau. Dr. his doctor. Is a danger to his own safety.

Therefore, by virtue of the authority granted to me by Chapter 394.463 (1) (b) 3, Florida Statutes, I hereby authorize the above Law Enforcement Officer to take said person into custody and to deliver him forthwith to the receiving facility for examination and treatment.

Said Law Enforcement Officer is further requested to deliver this certificate as well as his own report below to the person authorized to receive the patient at said facility so that these documents may be a part of the above patient's clincial record.

Date May. 28 1982

Witness: Stuart L Smith

Gordon Edwards MD M.D.
Board Eligible Psychiatrist and Mental Health Prof.
pursuant to Sec. 394.455

(Address) 4950 Le Jeune Rd. Coral Gables, Fla.

REPORT OF LAW ENFORCEMENT OFFICER

STATE OF FLORIDA, COUNTY OF DADE, FLORIDA

TO 10300 SW 216 ST. (COMMUNITY HEALTH INST)
(Receiving Facility and Address)

Pursuant to Section 394.463 (1) (b) 2, Florida Statutes, requiring a written report detailing the circumstances under which DONALD RICHARD PINKISMAN was taken into custody, I report herewith as follows:

Time and Date 28 MAY 1982 6 or 7 pm Behavior Observed THOSE AS REPORTED TO THIS OFFICER IN WRITING BY PHYSICIAN GORDON LEWIS MD

81-6896

Family Members of others present when patient was taken into custody:

Name _____ Name _____

Address _____ Address _____

Relationship _____ Relationship _____

Telephone Number _____ Telephone Number _____

Indicate personal knowledge by family members and others about patient: _____

Physical Restraints, if any _____

Did the patient appear mentally ill and likely to injure himself or others if not immediately confined? _____

Delivered to Receiving Facility on BY HANDS OF GORDON 28 MAY, 19 82, at _____ a.m., p.m.

Date 28 MAY 1982

(By authority of Chapter 394.463 (1) (b), Florida Statutes)

(Law Enforcement Officer)

(July, 1972) Use Back of Page for Additional Information

"EXHIBIT A"

Supreme Court, U.S.
FILED
MAY 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1711

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

DONALD PRUESSMAN, Petitioner,

v.

GORDON LEWIS, M.D.; DR. JOHN T. MacDONALD FOUNDATION d/b/a DOCTORS HOSPITAL; JOSEPH F. McALOON; STUART L. SMITH; L.C. SMALL; CITY OF CORAL GABLES; KEN BUSH; R. POOR; D. MOORE; RICHARD J. NAUE, JR.; GLENN FALK; COMMUNITY HEALTH OF SOUTH DADE, INC.; JOHN H. TRENHOLM; JEROME BELOFF, M.D.; ANGEL DIAZ, M.D.; MICHAEL ROBINSON, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the federal court action was properly dismissed where petitioner filed both a state and federal court action arising out of the same incident, where both proceedings sought relief under state law and 42 U.S.C. Section 1983, where petitioner obtained jurisdiction over defendants in the state court action first and pursued discovery in the state court action, where petitioner "egregiously failed to prosecute" the federal court case and dismissal would avoid piecemeal litigation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1-5
SUMMARY OF THE ARGUMENT	6-7
ARGUMENT	8-16
THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED; THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS DOES NOT: (A) DIRECTLY AND APPARENTLY CONFLICT WITH DECISIONS OF THIS COURT; (B) INVOLVE IMPORTANT FEDERAL JURISDICTIONAL ISSUES; (C) CONFLICT WITH ITS OWN DECISIONS; (D) CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS; (E) RAISE ISSUES OF IMPORTANCE TO THE PUBLIC.	
CONCLUSION	17
CERTIFICATE OF SERVICE	18-19

TABLE OF AUTHORITIES

	Page
Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)	5,6,9,10, 11,13,14, 15,16
Keortest Mfg. Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180, 183, 72 S.Ct. 219, 221, 96 L.Ed. 200, 203 (1952)	11
McClellan v. Carland, 217 U.S. 268, 282, 30 S.Ct. 501, 505, 54 L.Ed. 762, 767 (1910)	10
Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, 460 U.S. 1, 103 S.Ct. 927, 47 L.Ed.2d 765 (1983)	5,6,9-10, 12 n.2, 14-15,16
Young v. Board of Education, 416 F.Supp. 1139, 1141 (D. Colo. 1976)	15

OTHER AUTHORITIES:

42 U.S.C. Section 1983	1, 3, 4,

STATEMENT OF THE CASE[1]

On May 28, 1986, the day the statute of limitations ran, petitioner filed two complaints, one in the Eleventh Judicial Circuit in and for Dade County, Florida, and the other in the United States District Court, Southern District of Florida. (A.2-3). Both the state court and federal court actions arose from petitioner's confinement in the Community Health Center of South Dade. (A.2-3). In both actions plaintiff sought relief under both state law and 42 U.S.C. Section 1983. (A.2-3)

Plaintiff perfected service on all defendants in the state court action by

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[1]/ Throughout this brief, the symbol "A" will stand for the Petitioner's Appendix.

the middle of April, 1987, and discovery proceeded in that action. (A.2-4). On the otherhand, plaintiff merely issued summonses and did not obtain service on any of the defendants in the federal proceeding. (A.3). The federal action remained dormant for the following sixteen (16) months (until October 2, 1987) while the state action was vigorously pursued. (A.3-4, 9-10). The district court sua sponte issued an order on October 2, 1987 to show cause why the case should not be dismissed. (A.9-10). Plaintiff responded and on November 24, 1987 the court quashed its order to show cause and directed plaintiff to effect service upon all parties within forty-five (45) days. (A.11-22).

Plaintiff filed an amended complaint in the federal proceeding on January 6, 1988 alleging counts for civil rights violation under 42 U.S.C. Section 1983, conspiracy, assault and battery, false imprisonment, and a prayer for declaratory relief. (R.1-5). In January, 1988, plaintiff finally obtained service on some of the defendants nineteen (19) months after the filing of the action. (A.3-4). No discovery was ever undertaken in the federal court action.

The served defendants moved to dismiss the federal court action on various grounds. (A.6).

The district court entered an order dismissing plaintiff's state claims on January 28, 1988 (from which no appeal was

taken) and thereafter entered another order on February 8, 1988 dismissing the remaining Section 1983 claim and prayer for declaratory relief. (A.6-8, 23-24). The district court held that plaintiff elected to pursue his remedies in state court as evidenced by his "egregious failure" to prosecute the case. (A.6-7). Plaintiff appealed to the United States Court of Appeals, Eleventh Circuit after the district court's denial of plaintiff's motion to vacate order of dismissal. (A.42).

On December 19, 1988, the Eleventh circuit issued its unpublished opinion affirming the district court and stated in relevant part:

> [O]ur evaluation of the factors listed in Colorado River and Moses H. Cone establish that its order of dismissal does not require reversal. ... In reaching this decision we have given particular weight to the progress of the litigation in state court and the exceptional circumstances constituting Pruessman's "egregious failure to prosecute this case."

(A.5).

SUMMARY OF THE ARGUMENT

The district court acted within its sound discretion in dismissing the amended complaint. The district court decision is consistent with this Court's decisions in Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) and Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). When the factors set forth in the two cases are applied to this case, it is clear that dismissal of the federal court action was proper.

Petitioner filed the state and federal court actions on the same day but chose to actively litigate the controversy only in

the state court action. Petitioner obtained jurisdiction over defendants in the state court action over eighteen months before any of the defendants were served in the federal court action. While the parties were served and discovery was undertaken in the state court action, petitioner "egregiously failed to prosecute" the federal court case.

The dismissal of the case will also avoid the potential for piecemeal litigation.

NO. 88-1711

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

DONALD PRUESSMAN, Petitioner,

v.

GORDON LEWIS, M.D.; DR. JOHN T. MacDONALD FOUNDATION d/b/a DOCTORS HOSPITAL; JOSEPH F. McALOON; STUART L. SMITH; L.C. SMALL; CITY OF CORAL GABLES; KEN BUSH; R. POOR; D. MOORE; RICHARD J. NAUE, JR.; GLENN FALK; COMMUNITY HEALTH OF SOUTH DADE, INC.; JOHN H. TRENHOLM; JEROME BELOFF, M.D.; ANGEL DIAZ, M.D.; MICHAEL ROBINSON, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED; THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS DOES NOT: (A) DIRECTLY AND APPARENTLY CONFLICT WITH DECISIONS OF THIS COURT; (B) INVOLVE IMPORTANT FEDERAL JURISDICTIONAL ISSUES; (C) CONFLICT WITH

ITS OWN DECISIONS; (D) CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS; (E) RAISE ISSUES OF IMPORTANCE TO THE PUBLIC.

The Petition for Writ of Certiorari should be denied. The decision of the Eleventh Circuit Court of Appeals does not conflict with any decision of this Court, the Eleventh Circuit or any other Circuit Courts of Appeal. The case does not raise any issue of importance to the public which has not been, but should be, settled by this Court.

First, the decision of the Eleventh Circuit is perfectly consistent with the decisions of this Court in Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976); and Moses H. Cone

Memorial Hospital v. Mercury Construction Corporation, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). In Colorado River, the United States Supreme Court reiterated the general rule that "the pendency of an action in state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction..." 424 U.S. at 817, 96 S.Ct. at 1246, quoting McClellan v. Carland, 217 U.S. 268, 282, 30 S.Ct. 501, 505, 54 L.Ed 762, 767 (1910). The Court held, however, that circumstances do exist which allow dismissal of a federal suit due to the presence of a concurrent state proceeding. As this Court opined in the decision, the reasons for permitting the dismissal are based on "considerations of '[w]ise judicial administration, giving

regard to conservation of judicial resources and comprehensive disposition of litigation.'" Colorado River Water Conservation District v. United States, 424 U.S. at 817, 96 S.Ct. at 1246, quoting Keortest Mfg. Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180, 183, 72 S.Ct. 219, 221, 96 L.Ed. 200, 203 (1952).

The decision of whether to defer to state courts is left to the discretion of the district court and requires the balancing of several factors including: "the absence of any substantial progress in the federal court litigation; the presence in the suit of extensive rights governed by state law; the geographical inconvenience of the federal forum;" the potential for piecemeal litigation; the adequacy of each forum to

protect the party's rights; the order in which jurisdiction was obtained by the concurrent forums; and whether one of the courts has assumed jurisdiction over the property in dispute.[2]

Clearly two factors are not present in this case. First, there is no property involved in the litigation so there was no assumption by either court of jurisdiction over any property. Second, the federal court is in close proximity to the state court so there is no contention that the federal forum is any less convenient than the state court.

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[2]/ Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, 460 U.S. at 15-16, 103 S.Ct. at 936-937.

The remaining factors as applied to the facts of this case, however, strongly support the dismissal of the federal court action. First, jurisdiction over the defendants was obtained in state court nine months before any of the defendants were served in federal court. The Section 1983 claim was first perfected in state court over four months before service of the defendants in federal court. Even more important, substantial discovery was undertaken by the parties in the state court action and several motions were argued in that court. While the state court action was being actively litigated, the federal court action was not prosecuted. The Colorado River Court found the absence of any other proceedings in federal court other

than the complaint to be a significant factor in upholding the dismissal of the complaint. 424 U.S. at 820, 96 S.Ct. at 1248. Both the District Court and Circuit Court of Appeals noted the significance of the plaintiff's failure to prosecute the federal court action in reaching their respective decisions. (A.5, 7).

The dismissal of the case will also avoid the potential for piecemeal litigation. All claims based on state law were dismissed from the federal court action, and no appeal was taken from that order (A.23-24). On the otherhand, the actively pursued state court action is litigating both the state claims and the section 1983 claim.

Petitioner argues that the application of the principles in Colorado River and Moses

H. Cone Memorial Hospital decisions violates the spirit of Section 1983 legislation. However, this Court in Colorado River specifically noted that the principles allowing the dismissal of a federal action due to the presence of concurrent state proceedings "for reasons of wise judicial administration" are "unrelated to considerations of proper constitutional adjudication and regard for federal-state relations." 424 U.S. at 817, 96 S.Ct. at 1246. Here, the Colorado River principles are totally unrelated to considerations of proper adjudication under Section 1983. In any event, there is no question that "[t]he state court can award all relief available under the federal statutes." Young v. Board of Education, 416 F.Supp. 1139, 1141 (D.

Colo. 1976). Therefore, since the Federal Court has dismissed all claims based on state law, plaintiff can receive full and complete relief in state court and the federal forum is inadequate to protect plaintiff's rights.

Consequently, when the factors enunciated in the Colorado River and Moses H. Cone Memorial Hospital cases are balanced, it is clear that the dismissal of the federal court action was proper. There is no conflict between the Eleventh Circuit opinion and any decision of this Court or any other decision of a Circuit Court of Appeal. There is no basis for this Court to exercise its discretionary jurisdiction.

CONCLUSION

Based on the foregoing argument and authorities, respondent, GLENN FALK, respectfully requests this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

BY: Betsy E. Gallagher
BETSY E. GALLAGHER

CERTIFICATE OF SERVICE

I, Betsy E. Gallagher, a member of the Bar of this Court, certify that three copies of Respondent's Reply to Petition for Writ of Certiorari were served by mail, postage prepaid, this 23rd day of May, 1989, upon the following:

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

NO. 88-1711

DONALD PRUESSMAN

Petitioner,

v.

GORDON LEWIS, M.D.; DR. JOHN T. MacDONALD FOUNDATION d/b/a DOCTORS HOSPITAL; JOSEPH F. McALOON; STUART L. SMITH; L.C. SMALL; CITY OF CORAL GABLES; KEN BUSH; R. POOR; D. MOORE; RICHARD J. NAUE, JR.; GLENN FALK; COMMUNITY HEALTH OF SOUTH DADE, INC.; JOHN H. TRENHOLM; JEROME BELOFF, M.D.; ANGEL DIAZ M.D.; MICHAEL ROBINSON

Respondents.

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION OF RESPONDENTS CITY OF CORAL GABLES; KEN BUSH; R. POOR; D. MOORE; RICHARD J. NAUE, JR.; GORDON LEWIS, M.D.; GLENN FALK

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY TO BRIEF IN OPPOSITION
OF RESPONDENT GORDON LEWIS, M.D. 1

REPLY TO BRIEF IN OPPOSITION
OF RESPONDENTS CITY OF CORAL
GABLES, KEN BUSH, R. POOR,
D. MOORE, RICHARD J. NAUE, JR. 11

REPLY TO BRIEF IN OPPOSITION
OF RESPONDENT GLENN FALK 16

CONCLUSION 18

TABLE OF AUTHORITIES

CASES: Page

Brillhart v. Excess Insurance Co. of America, 316 U.S. 491 (1942) 2

City Federal Sav. Bank v. Dominion Federal Sav. & Loan Ass'n. 657 F. Supp. 477 (S.D. Fla. 1987) 4

Devona v. City of Providence, 652 F. Supp. 683 (D.R.I. 1987) 7, 8, 9

Diaz Gonzalez v. Colon Gonzalez, 536 F. 2d 453 (1st Cir. 1976) 8

Glover v. City of Portland, Tennessee 675 F. Supp. 398 6

Lumen Constr. Inc. v. Brant Construction, Inc., 780 F.2d 691 (7th Cir. 1985) 9, 10

Moses H. Cone Memorial Hospital v. Mercury Construction Corp. 460 U.S. 1 (1983) 10

Roy v. Verchereau, 619 F. Supp. 1323 (D.C. Vt. 1985) 8

Sisler v. West, 570 F. Supp. 1 (S.D. Iowa) aff'd, 718 F.2d 1107 (8th Cir. 1983)

Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978) 2, 3

Young v. Board of Education, 416 F. Supp. 1139 (D.C. Colo. 1976) 17

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Respondents.

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

REPLY TO BRIEF IN OPPOSITION OF RESPONDENT GORDON LEWIS, M.D.

The record and my petition contradicts LEWIS' assertion that he was served on January 20, 1988. (Brief in opposition, page 2). This respondent received the complaint and summons by certified mail on

January 6, 1988.[1]

Relying on *Brillhart v. Excess Insurance Co. of America*, 316 U.S. 491 (1942); and *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978), LEWIS argues that the potential for piecemeal litigation "overwhelmingly" weighs in favor of the dismissal of my § 1983 action. (Brief in opposition, page 9).

Neither *Brillhart* or *Will* apply to the issue before this Court for review. The message in *Brillhart* was directed to a pending state suit which solely concerned a declaratory judgment and

> ". . .presenting the same issues, not governed by federal law, between the same parties." *Brillhart*, supra, 316 U.S. at 495.

In *Will*, even though a federal issue was involved, the case is distinguishable as it concerned the propriety of a writ of

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1/ Petition, appendix, page A-38. Record reference: R1-17-Exhibit "A".

mandamus directed to a district court's stay in the proceedings of a declaratory judgment suit where the parties and issues were identical. However, there is an important admonition in Justice Brennan's dissenting opinion that is instructive when considering the Eleventh Circuit's opinion in this case:

> ". . .there lurks an ominous potential for the abdication of federal court jurisdiction in the opinion's disturbing indifference to 'the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.'" *Will*, supra, 437 U.S. at 669.

LEWIS contends that the state court action has progressed much further than the federal court action and "overwhelmingly" weighs in favor of dismissal of my federal suit. (Brief in opposition, pages 9 and 13). Both the record and my petition contradict this assertion.[2]

2/ Petition, appendix, pages A-33, A-34, A-52, A-53, A-54. Record reference: R1-17-6.

State action progress consists of discovery and exchange of documents and partial answers to interrogatories. One deposition has been taken and numerous discovery disputes remain. This discovery in the state action can be utilized, concededly without my objection, in the federal action. Motions to dismiss have yet to be entertained and the action is still subject to a stay order of the state court of September 29, 1988.

Relying on *City Fed. Sav. Bank v. Dominion Fed. Sav. Loan Ass'n*, 657 F. Supp. 477, 480, LEWIS argues there is no reason for the district court to proceed with my § 1983 claim where "one umbrella is available that will keep everyone out of the rain." (Brief in opposition, page 10).

The fact situation in my action clearly shows that it is only the federal umbrella that can keep everyone dry.

LEWIS argues that the Eleventh Circuit's ruling is consistent with rulings of this Court and other lower federal courts that the dismissal of a federal action in deference to a state court action was proper, even when based on a violation of § 1983. (Brief in opposition, pages 16 through 20).

Dismissal of a suit by a federal court depends on the facts of each case. There is no mechanical checklist. A synopsis of the cases relied on by LEWIS in support of his argument reveals the following.

In *Sisler v. West*, 570 F. Supp. 1 (S.D. Iowa 1983), the plaintiff filed a federal § 1983 action eighteen months after filing a state court action based on state law theories. The issues and the parties were identical in both suits and the complaint was dismissed.

Unlike the plaintiff in *Sisler*, I

simultaneously filed a complaint based on state law claims in state court and my §1983 claim in federal court. Further, the parties and issues in my two actions are not identical.

In *Glover v. City of Portland, Tennessee*, 675 F. Supp. 398 (M.D. Tenn. 1987), the plaintiff filed a suit in state court. Some nine months later, the state complaint was amended adding parties and, about the same time, the plaintiff filed an identical complaint in federal court. Approximately one month later, the plaintiff voluntarily dismissed her federal action. Some four months later, the plaintiff voluntarily dismissed her claim against one defendant in state court and filed the claim as to that defendant in federal court. The plaintiff's second federal complaint was dismissed.

Unlike the plaintiff in *Glover*, I have

not non-suited any defendants in the state forum and added them in the federal forum. There has been no forum shopping and, from the onset, I have expressed and reserved my intent to pursue my federal claim in federal court. Further, the federal and state actions have never been identical.

In *Devona v. City of Providence*, 652 F. Supp. 683 (D.R.I. 1987),[3] the plaintiff filed similar claims in state and federal courts, the only difference being that the state proceeding had one additional defendant. Based on this fact, the district court determined that only the state forum could afford comprehensive disposition of the suit and dismissed the complaint.

Distinguishing *Devona* with my § 1983 suit, the opposite holds true. It is only the federal forum that can afford

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3/ This case is not included in LEWIS' Table of Authorities.

comprehensive disposition of the suit.

In his discussion of the dismissal in *Devona*, LEWIS states that the presence of a § 1983 action did not alter the court's conclusion. (Brief in opposition, page 20), and reference is made to three additional § 1983 cases which need to be distinguished. All three of these involved stays, not dismissals.

The first, *Roy v. Verchereau*, 619 F. Supp. 1323 (D.C. Vt. 1985), involved abstention based on avoiding a potentially disruptive effect on state efforts to establish a coherent policy.

The second, *Diaz Gonzalez v. Colon Gonzalez*, 536 F.2d 453 (1st Cir. 1976), was a case where the judgment of a district court was vacated and remanded. The First Circuit held that the district court should have abstained because a Puerto Rican statute was at issue and the commonwealth

courts should be allowed to rule on the issue. The court also held that the district court should retain jurisdiction of the case while the plaintiff sought a decision from the commonwealth courts concerning the statutory question underlying his § 1983 action.

Finally, LEWIS presents *Lumen Const. Inc. v. Brandt Const. Co., Inc.*, 780 F.2d 691 (7th Cir. 1985), which like *Devona*, supra, was a suit where the state action was a good deal more comprehensive than the federal case. Also, the court noting that the plaintiff's civil rights claims arose out of a contractual dispute, the court found it would be impossible to decide the federal claims without some resolution of the state law claims. Moreover, the district court could have reasonably concluded that all claims were likely to be determined in the state court action.

"In short, the similarity between the two cases is sufficient to justify the conclusion that the state court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties. *Lumen*, supra, at 695, 696 citing *Moses H. Cone Hospital v. Mercury Const. Co.*, 460 U.S. 1. 28.

Applying the above *Cone* standard to my § 1983 action, it is evident that the state-court litigation cannot completely and promptly resolve the issues between the parties. Further, in *Lumen*, supra, the judgement of the district court was modified from a dismissal to a stay.

The above cases, seen in their true light, do not support the proposition for which they are propounded to this Court.

REPLY TO BRIEF IN OPPOSITION OF RESPONDENTS KEN BUSH; R. POOR; D. MOORE; RICHARD J. NAUE, JR. (CITY AND OFFICERS)

The opposing brief filed by CITY and OFFICERS is incompatible with Supreme Court Rule 34.6 of this Court. It contains argument of many of the factual allegations of my complaint recited in my petition's statement of the case. A copy of the complaint has been lodged with the Clerk of this Court.

There are evidentiary matters throughout the brief that are not supported by the record or evidence. These matters are proper before a trial court, not this Court where the issue is the surrender of federal jurisdiction of an action brought under 42 U.S.C. § 1983.

Absent specific instructions in the Supreme Court Rules, I am following the advice given in the publication, "Supreme Court Practice", which counsels that

scandalous matter has no place in a brief, and should be addressed in a motion to strike.[4] Such a motion is being filed simultaneously with this reply.

In their brief, CITY and OFFICERS belabor the matter of service of process. (Brief in opposition, pages 6 and 14). With one possible exception, raised for the first time by respondent CITY, this matter has been adequately addressed in my petition and is supported by the record that service was proper and valid.[5]

CITY argues that by employing Federal Rule of Civil Procedure 4(c)(2)(C)(ii) upon CITY, a municipality, service was improper and invalid because it was not personally served on the chief executive officer

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4/ Supreme Court Practice by Stern, Gressman & Shapiro. (Sixth Edition). Section 13.11(n), page 566.

5/ Petition, pages 13, 15, 19, 21, appendix, pages A-27, A-36, A-38, A-39, A-49, A-50, A-51. Record reference: R1-17-2 & Exhibits "A" through "A"(16).

pursuant to Rule 4(d)(6) and that

> "where a particular method of serving is pointed out by statute that method *must* be followed." (emphasis added by respondent).

In the guide I used for effecting service, West's Federal Civil Judicial Procedure (1987 Edition), Rule 4(d)(6) states:

> Upon a state or municipal corporation or other government organization thereof subject to suit, by delivering a copy of the summons and complaint to the chief executive officer thereof, *OR* (emphasis added), by serving the summons and complaint in the manner prescribed by law of that state for the service of summons or other like process upon any such defendant.

There is no mention in West's that delivery means personal service nor. . .

> "where a particular method of serving process is pointed out by statute, that method must be followed." (Brief in opposition, page 15).

In accordance with the language of the rule, service was effected on the Mayor or in his absence the Vice Mayor or in the

absence of both, any member of the City Council. This was accomplished by certified mail, return receipt requested. Postal records indicate that service was delivered and accepted on January 7, 1988.[6]

Further, it would appear that the mere fact that CITY and OFFICERS appeared in the district court and argued their motion to dismiss on January 25, 1988, precisely twenty days after service was effected, the matter of service as to these respondents was rendered moot.

Finally, CITY and OFFICERS allege that I intentionally discharged my legal counsel. (Brief in opposition, page 17). The record and my petition contradict this allegation.[7] As indicated to the district court, my

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6/ Petition, appendix, page A-38). Record reference: R1-19-Exhibits "A" and "A"(6).

7/ Petition, appendix, page A-18. Record reference: R1-4-5.

attorney was suspended from practice.[8] Further, there never has been legal representation in the federal action.

The inferences of these respondents with respect to "egregiousness" in the prosecution of my suit has no merit.

Filing a complaint the day before the statute of limitations expires is a right and cannot therefore be egregious. The delay in making service was cured when the district court, upon my showing of good cause, quashed it's order to show cause and ordered me to proceed with prosecution of the action. These facts, coupled with compliance of the district court's order to make service within the forty-five day period specified,[9] cannot constitute egregious conduct.

8/ Florida Bar v. Louis B. Stoskopf. Supreme Court of Florida, Case No. 70,856 (October 1, 1987).

9/ Petition, appendix, pages A-21, A-22.

REPLY TO BRIEF IN OPPOSITION OF RESPONDENT GLENN FALK

Respondent FALK states that both the state and federal actions commenced on May 28, 1986 sought relief under both state law and 42 U.S.C. § 1983. (Brief in opposition, page 1). The record and my petition contradict this. My complaint encompassing only state law claims was filed in state court on May 26, 1988, the same day my federal complaint based on federal law was filed in federal court.[10]

FALK represents to this Court that the federal action remained dormant for sixteen months after perfection of service of the state action. (Brief in opposition, page 2). The dates in FALK'S brief contradict this. April 5, 1987 to October 2, 1987 is a period of six months.

10/ Petition appendix, pages A-14, A-26. Record references R1-4-3 and R1-17-1.

FALK also alleges that I obtained jurisdiction over defendants in the state action over eighteen months before any of the defendants were served in the federal action. (Brief in opposition, page 7). As indicated above, my complaints were filed simultaneously in state and federal courts. The period of time between the service of the state complaint in April of 1987 and service of the federal complaint on January 7, 1988, is less than nine months.

Finally, relying on *Young v. Board of Education*, 415 F. Supp. 1139 (D.C. Colo. 1976), FALK argues that the state court action can award all relief available under the federal statutes. (Brief in opposition, pages 15 and 16).

The above is not possible in my case since the parties, issues, and damages are distinctly different in both forums.

CONCLUSION

The respondents have skirted the important jurisdictional issues presented in the petition and fail to set forth any valid reason why my petition should be denied. The need for review of the action below is undisputable.